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Supreme Court, U.S.
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No. 07-422

IN THE

# Supreme Court of the United States

TEMPLE UNIVERSITY HOSPITAL,

*Petitioner,*

v.

HUGH B. GALLAGHER, III AND JOANNE GALLAGHER, GUARDIANS OF THE ESTATE OF HUGH B. GALLAGHER, IV

*Respondents.*

**On Petition for Writ of Certiorari to the Superior Court of Pennsylvania**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Where a trial court erroneously submits a constitutionally defective claim for punitive damages to a jury in tandem with an underlying claim for compensatory damages, whether a reviewing court may presume that the constitutional error was harmless.

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Temple University Hospital states that it is a private, 501(c)(3) corporation. Its parent company is Temple University Health System, Inc., the parent company of which is Temple University—Of The Commonwealth System of Higher Education. No publicly held company owns any stock at any level.

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## INTRODUCTION

This Court has recognized repeatedly in recent years that punitive damages present a substantial risk of arbitrary and irrational deprivation of property, and hence are limited by the Due Process Clause of the Federal Constitution. *See, e.g., Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1064-65 (2007); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416-18 (2003); *Cooper Indus., Inc. v. Leatherman*, 532 U.S. 424, 436-40 (2001); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572-75 (1996); *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430-32 (1994). Among the constitutional limitations that this Court has recognized is that "[a] defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages." *State Farm*, 538 U.S. at 422.

The fundamental fairness concerns underlying this Court's punitive damages jurisprudence, however, are not limited only to excessive punitive damages awards, but also extend to compensatory damages awards tainted by punitive damages claims. This case is a perfect example. The trial court here not only allowed respondents to pursue a punitive damages claim based on conduct independent of the conduct upon which liability for negligence was premised, but also allowed the jury to consider liability for punitive damages in tandem with considering liability for negligence. The jury found petitioner liable for negligence, decided that punitive damages were warranted, and awarded $20 million in damages. When the trial court subsequently informed the jury that they were to consider *another* award of damages, they expressed surprise. And, after deliberating for less than an hour, they awarded respondents just $15,000 in punitive damages.

On review, the Pennsylvania appellate court recognized that the punitive damages claim could not pass muster under *State Farm*, and reversed the punitive

damages award. The court, however, refused to recognize the effect of that federal constitutional error upon the jury's simultaneous consideration of liability and compensatory damages. Rather, the court presumed that the federal constitutional error was harmless, and saddled *petitioner* with the burden of proving otherwise.

With all respect, the Pennsylvania appellate court thereby turned the law upside down. A federal constitutional trial error—to the extent subject to harmless-error review at all—is presumptively harmful, not presumptively harmless. Accordingly, the beneficiary of such an error bears the burden of proving that harmless-error review is warranted in the first place, and (if so) that the particular error did not, in fact, affect the aggrieved party's substantial rights.

By presuming that the constitutional error here did not affect petitioner's substantial rights, and saddling petitioner with the burden of proving otherwise, the Pennsylvania appellate court thus deprived petitioner of an appropriate remedy for the violation of its federal constitutional rights. That deprivation itself presents a important issue of federal law: constitutional rights would not be worth much if courts could simply presume that denials of such rights are harmless. The federal constitutional right recognized by this Court in *State Farm*, whereby a defendant may not be subjected to punitive damages based on conduct independent of the conduct on which compensatory liability is based, protects a defendant's substantial rights; that is why this Court recognized such a right in the first place.

Indeed, it is hard to see how the error at issue here could *not* have been prejudicial. It defies both common sense and human nature to suppose that a jury can consider whether a defendant's conduct is so reprehensible as to warrant punitive damages without letting that inquiry affect its simultaneous consideration whether tort liability is warranted in the first place, or

the amount of compensatory damages. For just this reason, several States have recognized that even a *proper* claim for punitive damages necessarily affects a jury's simultaneous consideration of liability and compensatory damages, and therefore require bifurcation of trials into separate compensatory and punitive phases. It follows *a fortiori* that where, as here, a claim for punitive damages is *erroneously* submitted to a jury in tandem with issues of liability and compensatory damages, the error necessarily affects the defendant's substantial rights.

This case, in short, shows that the risk of arbitrary and irrational deprivation of property presented by punitive damages claims is not neatly limited to punitive damages awards, but may spill over to taint compensatory damages awards. Because the Pennsylvania appellate court gave short shrift to the constitutional problems presented by such spillover, and ignored settled law regarding the remedy for a federal constitutional error, this Court should grant the petition and either summarily reverse the judgment or set this case for plenary review.

## OPINIONS BELOW

The Pennsylvania Supreme Court's unpublished decision denying review of the decision below is reprinted in the Appendix ("App.") at 1a. The Superior Court's unpublished decision is reprinted at App. 2-10a. The Pennsylvania Supreme Court's prior decision is published at 901 A.2d 981, and reprinted at App. 11-12a. The Superior Court's prior decision is reported at 2005 WL 2649868, and reprinted at App. 13-26a. The Court of Common Pleas' unpublished decision is reprinted at App. 27-41a.

## JURISDICTION

The Pennsylvania Supreme Court denied review on June 28, 2007. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

## PERTINENT CONSTITUTIONAL PROVISION

The Due Process Clause of the Fourteenth Amendment provides in relevant part that no State shall "deprive any person of ... property, without due process of law." U.S. Const. amend. XIV, § 1.

## STATEMENT OF THE CASE

### A. Background

This case arises out of an unsuccessful attempt by respondents' then 19-year-old son, Hugh Gallagher, IV, to commit suicide by setting himself on fire in May 2000. The unsuccessful suicide attempt caused Gallagher to sustain burns over 70% of his body, and he was transferred to the Intensive Burn Care Unit of petitioner Temple University Hospital for treatment. App. 27a.

On the night of June 7, 2000, Gallagher was one of four patients being treated in the Intensive Burn Care Unit. App. 29a. At around midnight, an unusual series of three alarms in the unit required the attention of all three nurses on duty. Pennsylvania Superior Court Joint Reproduced Record ("Pa.Rec.") 288-91, 320-21. First, two nurses responded to a malfunctioning ventilator in a patient's room, which required one of the nurses to ventilate the patient manually. *Id.* at 316-17, 320. Then an alarm sounded in a second patient's room. *Id.* at 170-71. The third nurse, Janice Lawson, responded to this alarm. *Id.* Before doing so, however, Nurse Lawson checked on Gallagher, and confirmed that his vital signs were normal. *Id.* at 171, 271. After treating the other patient for approximately six minutes, Nurse Lawson returned and found that Gallagher's airway was blocked, he was not breathing, and his heart rate was zero. App. 28a; Pa.Rec. 241-44. Nurse Lawson and the other nurses worked quickly to restart his breathing and heart rate. *Id.*; *see also* Pa.Rec. 301-04. Gallagher survived, but suffered anoxic brain injury that will prevent him from living independently in the future. App. 28a.

After Gallagher was resuscitated and the other alarms were resolved, Nurse Lawson went back and completed Gallagher's critical care "flow sheet" to document the event and the treatment given. Pa.Rec. 202-04, 1592. Nurse Lawson first estimated the times on the flow sheet, and then used the data printed out from Gallagher's heart rate monitor to make corrections. *Id.* at 204-05, 236. Rather than crossing through the original estimates on Gallagher's flow sheet, Nurse Lawson used "Wite-Out" liquid paper, which made it impossible to read what was underneath and is against hospital policy. *Id.* at 210.

In addition, Nurse Lawson only printed out data from the heart rate monitor for the time at which Gallagher's pulse was zero, and not for any prior period. *Id.* at 234-35. As the heart rate monitor saved data for only 24 hours, this information was lost. *Id.* at 263.

The next day, petitioner's Risk Manager Janet Leech reviewed the original flow sheet and accompanying heart rate printout. *Id.* at 399-400. Ms. Leech made a copy of the original flow sheet, and placed the copy in Gallagher's medical file with a note that the original was "in Risk Management." *Id.* at 400, 403. Ms. Leech retained the original flow sheet and the heart-rate-monitor printout in her office for safekeeping. *Id.* at 400, 408.

**B. Procedural History**

In April 2001, respondents (Gallagher's parents and legal guardians) filed this medical malpractice lawsuit against petitioner in the Pennsylvania Court of Common Pleas (Bonavitacola, J.). App. 28a. The original complaint raised only a simple negligence claim based on the allegedly deficient care that led to Gallagher's brain injury. *Id.*

During discovery, petitioner produced records pertaining to Gallagher's treatment, including his medical file containing the copy of the critical care flow sheet. App. 31-32a. Because the original flow sheet and the

heart-rate-monitor printout were not in that file, however, they were not included in the materials produced in discovery. *Id.* Only later, on the eve of trial, did petitioner realize that the original flow sheet (with the "Wite-Out") had never been produced, and gave it to respondents. Pa.Rec. 205-08.

Following this belated disclosure, respondents moved at trial to amend their complaint to add a claim for punitive damages. App. 32a; Pa.Rec. 452; 794-811. This new claim was not based upon petitioner's conduct leading up to Gallagher's injury, but rather upon petitioner's *post*-injury conduct regarding the flow sheet. App. 32a; Pa.Rec. 795-805. Specifically, respondents argued that petitioner had engaged in a "cover-up" consisting of two distinct components: (1) Nurse Lawson's use of "Wite-Out" on the flow sheet, and (2) petitioner's failure to produce the original flow sheet in discovery. *Id.*; *see also* Pa.Rec. 802 ("[W]e have clear evidence of a malicious attempt to cover up the record...."). As the trial court later stated:

> The punitive damages claim in this case arises not from any aspect of the care rendered to Gallagher by [petitioner]; rather, it arises from the hospital's *post*-injury actions, which a jury could reasonably find were part of a course of conduct intended to prevent [respondents] from discovering the full extent of [petitioner's] negligence on the evening of June 7, 2000, and thereby to reduce or eliminate the likelihood of an adverse jury verdict.

App. 33a (emphasis added).

Petitioner repeatedly objected to respondents' motion to amend the complaint to add a punitive damages claim. Pa.Rec. 452, 806-09, 1152-53. In particular, petitioner argued that because the claim for punitive damages was not based on the same conduct as the underlying negligence claim, submitting both claims to the jury

simultaneously would taint the jury's consideration of the negligence claim and violate petitioner's rights under both federal and state law. *Id.* 1156-57, 1212-15.

The trial court overruled these objections, and allowed respondents to amend their complaint to add a claim for punitive damages. *Id.* at 1158-61. In addition, although the court's initial instinct was to submit the question of punitive liability to the jury only *after* the jury had reached a decision on compensatory da ıages, *id.* at 1149-50, 1153, the court ultimately reversed course and ordered that the questions on both medical malpractice and punitive liability would be submitted in tandem. *Id.* at 1160-61; App. 33-34a. The court thereby structured the trial to allow the jury to decide everything except the *amount* of punitive damages in the initial round.

During closing arguments, respondents' counsel repeatedly commingled the negligence and punitive damages issues, referring to an alleged "cover-up" and other post-injury actions by petitioner that had no bearing on the issue of medical malpractice. *See, e.g.*, Pa.Rec. 1175 ("How do we know they did the wrong thing separate and apart from the records themselves? Their conduct. Their conduct."); *id.* at 1179 ("Haven't we all learned by now ... that what you do wrong is never as bad as the cover-up, and that when you cover things up, people are going to conclude your conduct was much worse than what you admit to."); *id.* at 1183 ("[W]e weren't able to uncover everything that was involved in the cover-up"). Indeed, respondents' counsel concluded his closing argument as follows:

> Now, I told you this case was about two alarms. It's about that one alarm, Hugh Gallagher's alarm that went off and nobody came. Right? It's about another alarm. Where are all those people, by the way? Where are they? Where is Nurse Lawson? Where is the risk manager and the nurse manager? ... Where are these people

> that tried to deny me my rights in court by obliterating my records and not preserving that computer information? Where are they? They're at Broad and Ontario [petitioner's address in Philadelphia]. I can't shout that loud. That's what Hugh would say.
>
> There is this question here: Was the conduct of Temple University Hospital willful or wanton or with reckless indifference to the rights of Hugh Gallagher, IV? That's the last question you have to answer. *That's not about the issue of not responding to alarms. It's not about that issue. It's about the cover-up.* That's the second alarm, ladies and gentleman. That's the alarm that you have to answer. They have to hear it. They have to hear it from you. Thank you.

Pa.Rec. 1208-10 (emphasis added).

The verdict form submitted to the jury contained four questions. *See id.* at 1382-83. The first three questions asked the jury to determine (1) whether petitioner was negligent in its treatment of Gallagher; (2) whether that negligence was a substantial factor in bringing about the harm; and (3) the amount of resulting damages sustained by Gallagher. *Id.* The fourth question asked the jury, "Was the conduct of Temple University Hospital willful or wanton or with reckless indifference to the rights of [Gallagher]?" *Id.* The jury responded affirmatively to each question and awarded respondents $20 million in damages. *Id.*; *see also* App. 28a.

After the jury was polled as to the verdict, the trial court informed them that their affirmative response to question four now required them to consider the amount of punitive damages to be awarded. Pa.Rec. 1317-18. The jury foreperson immediately interrupted and told the court: "I think the verdict we came to, because we half on one and half on the other, the question—" *Id.* at 1318. At

that point, the court cut her off before she could finish her statement. *Id.*

Petitioner's counsel immediately moved for a mistrial, because "[b]ased on the foreperson's statement, I believe what she was telling the Court was that they had already considered punitive damages in their deliberation. That's why I don't believe punitive damages are in the case. I argued that all along." *Id.* at 1319. The court denied petitioner's motion for a mistrial. *Id.* at 1320. The court also denied petitioner's request to submit a special interrogatory to the jury asking whether the damages verdict included punitive damages, *id.* at 1325-26, 1333, 1379-81, and refused a request from one of the jurors to speak to the court, *id.* at 1343.

The only additional evidence submitted to the jury regarding the amount of punitive damages was petitioner's net worth. *Id.* at 1344, 1348-49; App. 35a n.6. The jury deliberated for approximately forty minutes on the amount of punitive damages before returning a verdict of $15,000—*i.e.*, less than one-tenth of 1% of the $20 million compensatory damages award. Pa.Rec. 1375-76; *see also* App. 28a.

Petitioner filed a motion for a new trial. Pa.Rec. 1393-1431. In support, petitioner submitted two affidavits—one from a juror stating that the $20 million compensatory damage award included punitive damages, *id.* 1434, and the other memorializing a conversation to the same effect between another juror and a lawyer, *id.* 1435. The trial court, however, refused to consider these affidavits, denied the motion, and entered judgment against petitioner. App. 27-41a.

Petitioner timely appealed to the Pennsylvania Superior Court. Among its various challenges to the judgment, petitioner argued that the punitive damages claim was invalid under "both controlling federal constitutional law and Pennsylvania law," App. 16a, and that the trial court's error in submitting the issue of

punitive liability to the jury in tandem with the underlying issues of negligence and compensatory damages tainted the jury's negligence verdict and $20 million damages award, *see* App. 19-20a.

The appellate court agreed with petitioner in part, and reversed the $15,000 punitive damages award on the ground that "a defendant's acts that are independent from the conduct on which liability is premised may not serve as the basis for punitive damages." App. 18a. Nonetheless, the appellate court rejected petitioner's further argument "that it is entitled to a new trial on the medical malpractice claim because it was prejudiced by the inclusion of the claim for punitive damages." App. 19a. In particular, the appellate court held that the error must have been harmless because respondents introduced no *evidence* with respect to punitive damages that they otherwise could not have introduced. App. 20a. Accordingly, the appellate court affirmed the $20 million compensatory award in respondents' favor. App. 26a.

Petitioner next sought discretionary review by the Pennsylvania Supreme Court, which was granted. App. 11a. In a brief *per curiam* order, the Supreme Court vacated the Superior Court's ruling affirming the $20 million compensatory judgment in respondents' favor. *Id.* As the court explained, "the reason the Superior Court gave for its determination that Petitioner sustained no prejudice as a result of the trial court's error is insufficient to support that determination." *Id.* The Supreme Court thus remanded the case and ordered the Superior Court "to review the record and reconsider" the question of prejudice, and, if it could not decide the matter based on the record, to remand for a new trial. App. 11-12a.

On remand, however, the Superior Court summarily reaffirmed its prior conclusion that petitioner had not been prejudiced by the trial court's erroneous submission of the punitive damages claim to the jury. App. 2-10a.

This time, the appellate court made it crystal clear that it was starting from the premise that the error was harmless unless *petitioner* could prove otherwise. App. 2a ("[T]he record reflects that [petitioner] has failed to demonstrate that it suffered any prejudice."); App. 5a (same); App. 9a ("[Petitioner] has failed to show prejudice."). In particular, the Superior Court rejected petitioner's argument that respondents' *arguments* relating to liability for punitive damages ("It's about the cover-up," Pa.Rec. 1209) necessarily tainted the jury's consideration of compensatory liability and damages. App. 5-6a. According to the Superior Court, there could have been no prejudice because the jury was not instructed to award punitive damages, and therefore considered the issue of liability for punitive damages "in [a] vacuum." App. 7a.

Petitioner again sought discretionary review by the Pennsylvania Supreme Court. That court, however, denied such review on June 28, 2007. App. 1a. This petition follows.

## REASON FOR GRANTING THE WRIT

### The Pennsylvania Appellate Court Violated Due Process By Presuming That The Jury's Consideration Of An Invalid Punitive Damages Claim Was Harmless.

Underlying this Court's punitive damages jurisprudence of the past two decades is the basic insight that "[p]unitive damages pose an acute danger of arbitrary deprivation of property." *Honda*, 512 U.S. at 432. That insight, however, is not limited only to punitive damages awards. Rather, a constitutionally invalid punitive damages claim may taint a jury's consideration of underlying tort liability and compensatory damages. The award of $20 million in "compensatory" damages in this case proves the point.

As a threshold matter, it is axiomatic that the proper remedy for a federal constitutional error, even in state courts, presents an issue of federal law. *See, e.g.*, *Chapman v. California*, 386 U.S. 18, 21 (1967). Here, as the Pennsylvania appellate court noted, petitioner argued that the trial court violated its rights under *both* federal constitutional law and state law by submitting respondents' punitive damages claim to the jury. *See* App. 16a. The court agreed with that argument in language drawn virtually verbatim from this Court's decision in *State Farm*. *Compare* App. 18a ("[A] defendant's acts that are independent from the conduct on which liability is premised may not serve as the basis for punitive damages.") *with State Farm*, 538 U.S. at 422 ("A defendant's ... acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages."). To the extent that the Pennsylvania appellate court did not specify whether its decision to reverse the punitive award rested on federal or state grounds, of course, the presumption is that the decision rested on federal grounds. *See, e.g.*, *Harris v. Reed*, 489 U.S. 255, 261-62 (1989); *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983).

The Pennsylvania appellate court, however, proceeded to saddle *petitioner* with the burden of showing prejudice from that error, and held that petitioner had failed to carry that burden. *See* App. 2-9a; 19-22a. That approach to the proper remedy for a federal constitutional error is manifestly erroneous.

The key point here is that, as a matter of federal law, the error of submitting an unconstitutional punitive damages claim to a jury in tandem with a compensatory damages claim is inherently prejudicial. Such an error affects the jury's consideration of the compensatory claim in ways that cannot be isolated or quantified. It is not a mere "trial error," like the erroneous admission or exclusion of a particular piece of evidence or an improper instruction, the impact of which "may ... be quantitatively

assessed" in the overall context of the trial. *Arizona v. Fulminante*, 499 U.S. 279, 307-08 (1991). Rather, it is a structural error in the trial, and hence impervious to harmless-error review. *Cf. id.* at 306-12 (articulating standard for federal constitutional claims impervious to harmless-error review). It is almost as if the jury erroneously had been asked to decide two separate cases at once—an error that "affect[s] the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Id.* at 310.

It is simply impossible, as a matter of law or fact (not to mention common sense), to expect a jury considering evidence and/or argument regarding tort liability and compensatory damages not to be affected by concurrent evidence and/or argument regarding liability for punitive damages. Indeed, for this very reason, eight States have mandated bifurcation of compensatory and punitive liability altogether, at least upon a party's request. *See, e.g.*, Ark. Code § 16-55-211; Minn. Stat. § 549.20; Miss. Code § 11-1-65(1); N.J. Stat. § 2A:15-5.13; N.C. Gen. Stat. § 1D-30; N.D. Cent. Code § 32-03.2-11(2); Ohio Rev. Code § 2315.21(B); Va. Code § 8.01-374.1(B).[1] Social science

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[1] It is undisputed that no such bifurcation occurred here, and that the jury considered liability for negligence and compensatory damages in tandem with liability for punitive damages. The jury determined in the first phase of the trial that petitioner's conduct was "willful or wanton or ... reckless[ly] indifferen[t] to the rights of Hugh Gallagher, IV"—the predicate for an award of punitive damages under Pennsylvania law. App. 6-9a & n.3, 21-22a, 24a, 34a. Accordingly, the Pennsylvania appellate court's blanket assertion (in its first, vacated decision) that "[t]he trial court was careful to bifurcate the punitive damages claim from the compensatory claim," App. 20a, is misleading at best. *See also* App. 9a (referring to "the trial court's careful bifurcation of the relevant questions concerning compensatory *liability* and punitive *liability*") (emphasis added). Here, the trial court split

confirms the insight on which those statutes are based: submitting claims of liability for compensatory and punitive damages in tandem inherently tends to influence a jury's determination of compensatory liability. *See* Stephan Landsman *et al.*, *Be Careful What You Wish For: The Paradoxical Effects of Bifurcating Claims for Punitive Damages*, 1998 Wis. L. Rev. 297, 321, 334 (1998); *see also* Steven S. Gensler, *Prejudice, Confusion, and the Bifurcated Civil Jury Trial: Lessons from Tennessee*, 67 Tenn. L. Rev. 653, 666 & 669-70 (2000) (same); I John J. Kircher & Christine M. Wiseman, *Punitive Damages: Law & Practice* § 12:01, at 12-2 (2d ed. 2000) ("[C]ourts and commentators have recognized the potential prejudice *inherent* in permitting the jury to simultaneously receive evidence relative to the underlying cause of action and the demand for punitive damages.") (emphasis added); *see also id.* ("Introducing evidence which probes the reckless or malicious nature of defendant's conduct to support a punitive damage award ... threatens also to influence the jury's determination of substantive liability and compensatory damages.").

If a jury's consideration of a *proper* punitive damages claim affects its simultaneous consideration of compensatory damages, it follows that a jury's consideration of an *invalid* punitive damages claim affects the jury's simultaneous consideration of compensatory damages. *See, e.g.*, *Burke v. Deere & Co.*, 6 F.3d 497, 513 (8th Cir. 1993) ("The law is ... squarely against letting a contested compensatory award stand when punitive damages are set aside."); *Hartford Underwriters Ins. Co. v. Williams*, 936 So. 2d 888, 897 (Miss. 2006) (granting

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off only the jury's consideration of the *amount* of punitive damages; it did not bifurcate the issue of *liability* for compensatory damages from the issue of *liability* for punitive damages.

new trial on compensatory damages after trial court erroneously failed to bifurcate, given that "we can never know the full effect the premature hearing of the punitive damages evidence had on the jury's verdict for compensatory damages"); *General Motors Corp. v. Moseley*, 447 S.E.2d 302, 313 (Ga. Ct. App. 1994) ("[A]ny reversible error in the admission of evidence pertaining to the entitlement to punitive damages makes it difficult, if not impossible, to affirm a judgment on the compensatory claim, when both claims are litigated in the same phase of the trial."), *limited in part on other grounds*, *Webster v. Boyett*, 496 S.E.2d 459, 463 (Ga. 1998); *cf. Hall v. Babcock & Wilcox Co.*, 69 F. Supp. 2d 716, 733 (W.D. Pa. 1999) ("[T]here is no reason to believe that the jury did not place all the evidence of Defendants' wrongful conduct on the scale when determining whether Plaintiffs met their burden of proof on the issues of liability and compensatory damages."); *Francis v. Coughlin*, 755 F. Supp. 618, 619-21 (S.D.N.Y. 1991) (granting a new trial on both compensatory and punitive damages where, as here, jury's relative awards of compensatory and punitive damages suggested that jury included punitive component in compensatory award).

Thus, once the Pennsylvania appellate court determined that the trial court erred by submitting respondents' punitive damages claim to the jury, the court was not entitled to presume that the error was harmless and did not affect the $20 million compensatory award. But even putting aside the basic point that the error here is impervious to harmless-error review at all, the Pennsylvania appellate court still erred by saddling *petitioner* with the burden of proving that the error was harmful, instead of requiring respondents to prove that the error was harmless. In the criminal context, at least, it is black-letter law that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman*, 386 U.S. at 24; *see also Sullivan v.*

*Louisiana*, 508 U.S. 275, 278-82 (1993); *Fulminante*, 499 U.S. at 295-96. Given that punitive damages are "'quasi-criminal,'" and "operate as 'private fines' intended to punish the defendant and to deter future wrongdoing," *Cooper Indus.*, 532 U.S. at 432, it follows as a logical matter that the *Chapman* standard should govern any harmless-error inquiry involving punitive damages claims.

But even putting aside the question whether the stringent *Chapman* standard applies in this context, at the very least the Pennsylvania appellate court erred by presuming that the error was harmless, and saddling petitioner with the burden of proving otherwise. Even in civil cases, courts may not presume that a federal constitutional error was harmless. *See, e.g.*, *Fry v. Pliler*, 127 S. Ct. 2321, 2325-28 (2007); *O'Neal v. McAninch*, 513 U.S. 432, 437-38 (1995); *Brecht v. Abrahamson*, 507 U.S. 619, 627 (1993); *Kotteakos v. United States*, 328 U.S. 750, 776 (1946). Although these cases involve habeas corpus review of criminal convictions, their harmless-error analysis is not limited to that context. To the contrary, "precedent suggests that civil and criminal harmless-error standards do not differ in their treatment of grave doubt as to the harmlessness of errors affecting substantial rights." *O'Neal*, 513 U.S. at 441; *see also id.* ("[T]he current harmless-error sections of the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure (which use nearly identical language) both refer to [the same statute] as their statutory source."); *id.* at 442 ("[E]ven if ... we were to assume that the civil standard for judging harmlessness applies to habeas proceedings ... it would make no difference.").

Thus, both federal and state appellate courts have recognized—in sharp contrast to the court below—that "presuming prejudice, rather than harmlessness, is required by Supreme Court precedent" as a general matter, in civil as well as criminal cases, with respect to constitutional errors and other errors affecting

substantial rights. *Obrey v. Johnson*, 400 F.3d 691, 701 (9th Cir. 2005). A reviewing court must "begin with a presumption of prejudice" that "can be rebutted by a showing that it is more probable than not that the jury would have reached the same verdict even if [the error had not occurred]." *Id.; see also Sims v. Great Am. Life Ins. Co.*, 469 F.3d 870, 886 (10th Cir. 2006) ("[W]e must reverse unless we find that this jury's verdict more probably than not was unaffected by the error.") (citing *Obrey*); *Jerden v. Amstutz*, 430 F.3d 1231, 1240 (9th Cir. 2005) ("[W]e start with 'a presumption of prejudice.'") (quoting *Obrey*, 400 F.3d at 701); *In re Vanessa M.*, 138 Cal. App. 4th 1121, 1132 (Cal. Ct. App. 2006) (holding that burden of proving harmlessness of federal constitutional error rests on party that benefited from the error); *A.B. v. Y.Z.*, 878 A.2d 807, 811-12 (N.J. 2005) (*per curiam*) (same); *cf. Stockman v. Oakcrest Dental Ctr. P.C.*, 480 F.3d 791, 799 (6th Cir. 2007) ("Generally, a *non-constitutional* trial error is harmless unless it is more probable than not that the error materially affected the verdict.") (emphasis added; internal quotation and citation omitted). That rule has the virtue of comporting not only with law but with fairness: the beneficiary of an error, not its victim, should bear the burden of proof with respect to the error's impact. Needless to say, the decision below, which imposed the burden of proving prejudice on the party aggrieved by a constitutional error, *see* App. 2a, 5a, 9a, cannot be reconciled with these precedents.

And even beyond the error of putting the burden on the wrong party, the Pennsylvania appellate court's analysis fails on its own terms. Respondents told the jury that punitive damages were warranted because petitioner had engaged in a "cover-up" by belatedly producing a key document in discovery. As respondents' counsel put it to the jury: "Was the conduct of Temple University Hospital willful or wanton or with reckless indifference to the rights of Hugh Gallagher, IV? That's the last question

you have to answer. That's not about the issue of not responding to alarms. It's not about that issue. *It's about the cover-up.*" Pa.Rec. 1209 (emphasis added). It defies law and logic to suppose that this argument—that petitioner's *post*-injury conduct was "willful," "wanton," or "reckless[ly] indifferen[t]," *id.*—in no way affected the jury's consideration of negligence and compensatory damages. The Pennsylvania appellate court, however, simply asserted (after the Pennsylvania Supreme Court rejected its original harmless-error analysis as "insufficient," App. 11a) that the punitive damages claim must have been harmless because "[petitioner's] counsel did not request, and the trial court did not instruct, the jury to make any *award of punitive damages* or even explain the function of such damages or the factors that go into *making a punitive award* until after a verdict in the negligence phase was rendered." App. 7a (emphasis added).

That assertion, of course, assumes that the issue here is whether the $20 million compensatory award is an "award of punitive damages." But that is only a *label* that obscures the real issue. The real issue is whether the invalid punitive damages claim *affected* the $20 million compensatory damages verdict. Notwithstanding the remand from the Pennsylvania Supreme Court, the Pennsylvania appellate court never addressed that critical issue.

The bottom line here is that state courts, no less than federal courts, have a duty to vindicate federal rights. *See, e.g., Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 99-100 (1993). The court below abdicated that duty by saddling petitioner with the burden of showing prejudice from a federal constitutional error, and breezily dismissing the error here as harmless. This Court should not tolerate such abdication. As a matter of federal law, petitioner is "entitled to a trial free from the pressure of unconstitutional inferences," *Chapman*, 386 U.S. at 26, and the Pennsylvania appellate court deprived petitioner

of that federal right by affirming the $20 million compensatory award in this case notwithstanding the unconstitutional punitive damages claim.

## CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari, and either summarily reverse the judgment or set the case for plenary review.

Respectfully submitted,

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September 26, 2007

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**IN THE SUPREME COURT OF PENNSYLVANIA**
**EASTERN DISTRICT**

**HUGH B. GALLAGHER , III,**
**AND JOANNE GALLAGHER, GUARDIANS OF**
**THE ESTATE OF HUGH B. GALLAGHER, IV,**

**Respondents**

**v.**

**TEMPLE UNIVERSITY HOSPITAL,**

**Petitioner**

**No. 70 EAL 2007**

**Petition for Allowance of Appeal from the Order of the Superior Court**

**ORDER**

**PER CURIAM**

**AND NOW**, this 28th day of June 2007, the Petition for Allowance of Appeal is DENIED. The Application for Permission to File Post-Submission Communication is also DENIED.

TRUE COPY FROM RECORD
Attest: June 28, 2007
/s/
John W. Person, Jr., Esquire
Deputy Prothonotary
Supreme Court of Pennsylvania

**NON-PRECEDENTIAL DECISION**
**SEE SUPERIOR COURT I.O.P. 65.37**

**IN THE SUPERIOR COURT OF PENNSYLVANIA**

**HUGH B. GALLAGHER , III,**
**AND JOANNE GALLAGHER, GUARDIANS OF**
**THE ESTATE OF HUGH B. GALLAGHER, IV,**

**Appellees**

**v.**

**TEMPLE UNIVERSITY HOSPITAL,**

**Appellant**

**No. 574 EDA 2004**

Appeal from the Judgment entered February 12, 2004 in the Court of Common Pleas of Philadelphia County, Civil Division, at No. 002643, April Term 2001.

BEFORE: ORIE MELVIN, PANELLA and MONTEMURO*, JJ.

MEMORANDUM: **FILED JANUARY 10, 2007**

This matter is back before this Court on remand from our Supreme Court with direction that we review the record and reconsider whether Appellant, Temple University Hospital, has demonstrated that it suffered prejudice as a result of the trial court's error in allowing Appellees to amend their complaint to raise a claim for punitive damages. After further review, the record reflects that Appellant has failed to demonstrate that it suffered any prejudice. Accordingly, we affirm the judgment on the verdict for medical malpractice and compensatory damages.

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* Justice Montemuro did not participate in the reconsideration of this matter.

The underlying factual and procedural background was summarized in our prior memorandum, and will not be restated.

Our standard of review is well settled:

> This Court will not reverse a trial court's decision regarding the grant or refusal of a new trial absent an abuse of discretion or an error of law .... Further, if the basis of the request for a new trial is the trial court's rulings on evidence, then such rulings must be shown to have been not only erroneous but also harmful to the complaining party. Evidentiary rulings which did not affect the verdict will not provide a basis for disturbing the jury's judgment.
>
> *Yacoub v. Lehigh Valley Med. Assocs., P.C.*, 2002 PA Super 251, 805 A.2d 579, 586 (Pa. Super. 2002) (*en banc*).

Our Supreme Court has made clear that our review should involve a two-step process:

> Each review of a challenge to a new trial order must begin with an analysis of the underlying conduct or omission by the trial court that formed the basis for the motion. There is a two-step process that a trial court must follow when responding to a request for new trial ... First, the trial court must decide whether one or more mistakes occurred at trial. These mistakes might involve factual, legal, or discretionary matters. Second, if the trial court concludes that a mistake (or mistakes) occurred, it must determine whether the mistake was a sufficient basis for granting

> a new trial ... The harmless error doctrine underlies every decision to grant or deny a new trial. A new trial is not warranted merely because some irregularity occurred during the trial or another trial judge would have ruled differently; the moving party must demonstrate to the trial court that he or she has suffered prejudice from the mistake.
>
> *Harman v. Borah*, 562 Pa. 455, 756 A.2d 1116, 1122 (Pa. 2000). Thus, we consider whether the trial court made an erroneous ruling and, if so, whether the mistake constituted harmless error or whether Appellants suffered any prejudice. *Yacoub; Harman.* We will not reverse an order denying a new trial unless the trial court committed an error of law that controlled the outcome of the case.
>
> *Coward v. Owens Corning Fiberglass Corp.*, 1999 PA Super 82, 729 A.2d 614, 624 (Pa. Super. 1999).

*Antoniotti v. Eckels*, 840 A.2d 1013, 1015-1016 (Pa. Super. 2003).

We previously determined that the trial court erred in allowing Appellees to amend their complaint to include a claim for punitive damages but found the error was harmless due to waiver because the evidence regarding a cover-up was admitted without objection from Appellant. Our Supreme Court found this reason insufficient and vacated our order affirming the judgment as to compensatory damages and remanded with instructions. *Gallagher v. Temple Univ. Hosp.*, __ Pa. __, 901 A.2d 981 (2006). Thus, as per the Supreme Court remand order, we are left to reconsider whether Appellant has

demonstrated that it suffered prejudice as a result of the trial court's error.[1]

After further review, the record reflects that Appellant has failed to demonstrate that it suffered any prejudice by the amendment allowing the raising of a claim for punitive damages. Appellant argues in its supplemental brief on remand that it was prejudiced by inference from Appellees' arguments for a punitive sanction. They specifically contend that Appellees' counsel "intertwined malpractice and punitive liability, arguing that the alleged 'cover-up' proved Temple Hospital's liability for medical malpractice, and further exhorted the jury to punish Temple for the plaintiff ..." Appellant's Supplemental Brief on Remand at 13.

---

[1] The specific directive from the order reads as follows:

> This Court concludes that the reason the Superior Court gave for its determination that Petitioner sustained no prejudice as a result of the trial court's error is insufficient to support that determination. Therefore, it is hereby ordered that this case be REMANDED to the Superior Court, with instructions to review the record and reconsider whether Petitioner has demonstrated that it has suffered prejudice from the trial court's error.
>
> If the Superior Court concludes that, given the record before it, it is not in a position to decide the matter, and that Petitioner is entitled to a new trial, the Superior Court shall remand the case to the trial court to conduct a new trial. Jurisdiction relinquished. *See Harman v. Borah,* 562 Pa. 455, 756 A.2d 1116 (Pa. 2000); *Morrison v. Commonwealth, Dep't of Public Welfare,* 538 Pa. 122, 646 A.2d 565 (Pa. 1994).

*Id.* at __, 901 A.2d at 982.

Our review finds no support in the record for such a claim. In fact, Appellees' counsel never mentioned the words punish, punishment, or punitive damages during the medical malpractice phase of the case let alone urged the jury to find negligence liability based upon punitive concepts. Rather, Appellees' counsel took great care to properly outline only the elements applicable to compensatory damages for Hugh Gallagher's brain injury. N.T. Trial, 10/23/03, at 57-72. Likewise, the trial court only instructed on compensatory damages and never charged the jury on punitive damages during the compensatory phase of the trial. N.T. Trial, 10/24/03, at 13-16. Moreover, the trial court specifically instructed the jury that they were not there to punish anyone. *Id.* at 9, 24.

Furthermore, all of the instructions and arguments made it clear that the jury was only to consider whether the so-called "cover-up" conduct that occurred after the brain injury was willful or wanton or indifferent to the rights of Mr. Gallagher in pursuing his claim. *See id.;* at 41 (the trial court reiterated that "when I indicated to you on this verdict sheet was the conduct of [Appellant] willful or wanton or with reckless indifference to the rights of Hugh Gallagher, IV, that pertains to anything that may have occurred after the injury was sustained. Not before, after. Okay."). Instantly, the trial court did not give the general instructions applicable to punitive damages,[2] and

---

[2] *See, e.g.*, PASSCJI 14.00, which provides:

> 14.00 (Civ) PUNITIVE DAMAGES - GENERAL INSTRUCTIONS
>
> [If you find that the defendant's conduct was a substantial factor in bringing about the harm the plaintiff is alleged to have suffered and] If you find that the conduct of the defendant was outrageous, you may award punitive damages, as well as any compensatory damages, in order to

the jury was not asked to make an award of damages to punish Appellant for its post-jury conduct until after the jury had determined that Mr. Gallagher was entitled to compensatory damages for Appellant's negligence in response to his oxygen deprivation, which resulted in his brain injury. Question No. 4 on the Verdict Sheet[3] merely asked for an answer to a threshold question necessary for determining whether a further assessment of punitive damages would be proper. *See SHV Coal, Inc. v. Continental Grain Co.*, 526 Pa. 489, 493, 587 A.2d 702, 704 (1991) (stating "Assessment of punitive damages are proper when a person's actions are of such an outrageous nature as to demonstrate intentional, willful, wanton or reckless conduct, and are awarded to punish that person for such conduct."). Appellees' counsel did not request, and the trial court did not instruct, the jury to make any award of punitive damages or even explain the function of such damages or the factors that go into making a punitive award until after a verdict in the negligence phase was rendered. Simply stated, how could the jury have included punitive damages in the compensatory verdict on the malpractice claim when they were never instructed on the purpose or function of punitive damages and were never told they could award such damages? Therefore, we cannot presume that the jury understood the purpose for Question No. 4 in the vacuum in which it was presented.

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> punish the defendant for his conduct and to deter the defendant and others from the commission of like acts.
>
> A person's conduct is outrageous when he acts with a bad motive or when he acts with reckless indifference to the interests of others.

[3] Specifically, the question presented read as follows: "Was the conduct of Temple University Hospital willful or wanton or with reckless indifference to the rights of Hugh Gallagher IV?"

We further find Appellant's reliance on *Francis v. Coughlin,* 755 F. Supp. 618 (S.D.N.Y. 1990) and the cited law review articles, noting the general proposition that there is a greater likelihood for prejudice when compensatory liability and punitive damages are tried at the same time, are misplaced. The presentation of the case and instructions given by the trial court in *Francis* were substantially different from the manner in which the instant trial was conducted. First, unlike in *Francis,* compensatory liability and punitive damages were not tried at the same time in this case. In *Francis,* the words punitive damages actually appeared on the verdict slip, and the jury was instructed to determine whether it believed both compensatory damages and punitive damages were appropriate. Additionally, unlike here, the jury sent a note to the trial court during deliberations clearly suggestive of the fact that the jury was considering punitive damages in the compensatory phase. Further, the jury's first verdict was not listed as a dollar amount but in terms of one year's gross salary of each of the defendants, again clearly indicative of inclusion of a punitive component. *Id.* Finally, after the jury was informed that their first verdict was not acceptable, they deliberated further and returned a compensatory verdict which was grossly disproportionate to the evidence on compensatory damages, again suggesting a punitive component to their verdict. *Id.* at 620-21. Given the clear confusion as to the law on damages the District Court concluded that a new trial on damages was necessary.

Instantly, there is no record evidence of jury confusion. The verdict sheet here was unambiguous and required the jury to first find that Appellant was negligent and that its negligence was a substantial factor in bringing about Mr. Gallagher's brain injury and then make an award for compensatory damages for that brain injury. Only after those determinations were answered affirmatively was the jury asked to make the threshold determination of whether or not Appellant's conduct

following the injury was willful or wanton or with reckless indifference to the rights of Mr. Gallagher in pursing his claim. Significantly, the jury was never told that this question pertained to a punitive damages claim nor were they instructed to consider whether such damages were appropriate. While the record in *Francis* was replete with positive evidence that the jury was considering punitive damages in the compensatory phase of the case, there is no such evidence of confusion here, and the verdict was actually less than the high end of the economic damages claimed by the Appellees. Even in the absence of a punitive damages cause of action, the conduct of the hospital's personnel in altering and destroying Mr. Gallagher's hospital records and the difficulty in obtaining the original flow sheet was properly admitted to explain why Appellees could not show an exact time line surrounding the oxygen deprivation suffered by Mr. Gallagher and formed the basis for an adverse inference charge. While such evidence of the alleged post-injury cover-up could not itself legally support a claim for punitive damages, those events were clearly relevant and, therefore, admissible to show negligence and causation. The only change in the presentation of the case occasioned by allowance of the amendment to the complaint to present a claim for punitive damages was the inclusion of Question No. 4 on the verdict sheet. However, as previously noted, the jury was never told that the purpose of this question was to serve as a predicate determination for a potential punitive award. The arguments advanced by Appellees' counsel remained the same and did not call for punitive damages for post-injury conduct as suggested by Appellant's contentions in its brief. Given the trial court's careful bifurcation of the relevant questions concerning compensatory liability and punitive liability, we are convinced that the error in allowing a punitive damages claim to go forward could not have contributed to the compensatory verdict. Consequently, Appellant has failed to show prejudice, and the trial court did not

abuse its discretion in denying Appellant's motion for new trial.

Judgment on the verdict for medical malpractice and compensatory damages affirmed.

Judgment Entered.

/s/
Prothonotary

Date: January 10, 2007

**IN THE SUPREME COURT OF PENNSYLVANIA**
**EASTERN DISTRICT**

**HUGH B. GALLAGHER , III,**
**AND JOANNE GALLAGHER, GUARDIANS OF**
**THE ESTATE OF HUGH B. GALLAGHER, IV,**

**Respondents**

**v.**

**TEMPLE UNIVERSITY HOSPITAL,**

**Petitioner**

**No. 608 EAL 2005**

Petition for Allowance of Appeal from the Order of the Superior Court at 574 EDA 2004 dated September 15, 2005 affirming in part; reversing in part the order of the Court of Common Pleas Philadelphia County at 002643 dated February 12, 2004

**ORDER**

**PER CURIAM**

AND NOW, this 20th day of June, 2006, it is hereby ordered that the Petition for Allowance of Appeal is GRANTED. It is further hereby ordered that the portion of the Order of the Superior Court affirming the judgment on the verdict with respect to liability for medical malpractice and compensatory damages is VACATED.

This Court concludes that the reason the Superior Court gave for its determination that Petitioner sustained no prejudice as a result of the trial court's error is insufficient to support that determination. Therefore, it is hereby ordered that this case be REMANDED to the Superior Court, with instructions to review the record and reconsider whether Petitioner has demonstrated that it has suffered prejudice from the trial court's error.

If the Superior Court concludes that, given the record before it, it is not in a position to decide the matter, and

that Petitioner is entitled to a new trial, the Superior Court shall remand the case to the trial court to conduct a new trial. Jurisdiction relinquished. *See Harman v. Borah*, 756 A.2d 1116 (Pa. 2000); *Morrison v. Commonwealth, Dep't of Public Welfare*, 646 A.2d 565 (Pa. 1994).

TRUE COPY FROM RECORD
Attest: June 22, 2006
/s/
John W. Person, Jr., Esquire
Deputy Prothonotary
Supreme Court of Pennsylvania

**NON-PRECEDENTIAL DECISION**
**SEE SUPERIOR COURT I.O.P. 65.37**

**IN THE SUPERIOR COURT OF PENNSYLVANIA**

**HUGH B. GALLAGHER , III,**
**AND JOANNE GALLAGHER, GUARDIANS OF**
**THE ESTATE OF HUGH B. GALLAGHER, IV,**

**Appellees**

**v.**

**TEMPLE UNIVERSITY HOSPITAL,**

**Appellant**

**No. 574 EDA 2004**

Appeal from the Judgment entered February 12, 2004 in the Court of Common Pleas of Philadelphia County, Civil Division, at No. 002643, April Term 2001.

**BEFORE: ORIE MELVIN, PANELLA and MONTEMURO*, JJ.**

MEMORANDUM: **FILED SEPTEMBER 15, 2005**

Appellant, Temple University Hospital, appeals from the judgment entered in favor of the Appellees, Hugh B. Gallagher, III and Joanne Gallagher, guardians of the Estate of Hugh B. Gallagher, IV, in this medical malpractice case. Appellant raises various challenges to the jury's award of punitive damages. After review, we affirm in part and reverse in part.

The trial court aptly summarized the facts and procedural background of this matter as follows.

> In May, 2000, Hugh B. Gallagher, IV, then age 19 (hereinafter, Gallagher) was admitted to the

---

* Retired Justice assigned to the Superior Court.

burn intensive care unit (BICU) at Temple University Hospital, after suffering severe, self-inflicted burns in an unsuccessful suicide attempt. The BICU contained seven beds, and on the evening of June 7, 2000, three nurses were on duty in the unit. Nurse Janet Lawson was assigned to be Gallagher's nurse, and Gallagher was the only patient for whom she was responsible that evening.

Because Gallagher was having trouble breathing independently, he had a tracheotomy in place, which placed him at risk that a mucous or blood clot would block his airway. This required that he be suctioned at least once an hour, and was the most important reason that he had to be monitored.

At approximately 11:40 PM, Gallagher's airway became blocked, and he was unable to breathe. No one responded to his alarm for a period of between four and ten minutes, and by the time that Gallagher's condition was discovered, he was pasty white, had no heart rate, and was not breathing. Though he was resuscitated, there is no dispute that Gallagher suffered severe brain injury from loss of oxygen caused by the delay in responding to his alarm.

As a result, Gallagher (who had been a student at Penn at the time of this hospitalization) will never again live independently. He will likely never be able to hold a job, and will require the care of others for the rest of his life. He has difficulty walking and maintaining his equilibrium.

Gallagher's parents, his guardians, brought suit against Temple University Hospital for negligence. At trial, [the trial court] allowed the [Appellees] to amend their Complaint to

> add a claim for punitive damages [], and after an eight-day trial (from which the punitive damages claim was bifurcated), the jury returned a compensatory verdict of twenty million dollars.
>
> The parties then presented additional evidence on the issue of the [Hospital's] net worth, after which the jury was charged on punitive damages. The jury again retired to deliberate, after which it returned an additional award of $15,000.00 in punitive damages.

Trial Court Opinion, 8/23/04, (unnumbered) at 1-2. Subsequently, post-trial motions were denied, and delay damages were awarded. This appeal followed the entry of judgment.

On appeal, Appellant presents the following questions for our review:

> A. Is Temple Hospital entitled to judgment in its favor on a punitive damages claim that is constitutionally infirm under federal due process principles, legally invalid under Pennsylvania law, and factually insufficient as a matter of law?
>
> B. Is Temple Hospital entitled to a new trial where the jury's malpractice liability and damages verdict was compromised and irreparably tainted by plaintiffs' constitutionally infirm, legally invalid and/or factually insufficient punitive damages claim?
>
> C. Did the trial court commit reversible error by its refusal to charge the jury on the principles of vicarious liability under the MCARE Act that pertain specifically to the award of punitive damages against health care providers?

> D. Is Temple Hospital entitled to a new trial due to the trial court's failure to promptly investigate, and to ameliorate if possible, the issue of jury confusion when it first arose at trial, and, additionally, by the trial court's refusal post-trial to receive or consider permitted juror communications that confirmed the jury had in fact mistakenly but improperly included punitive damages in its malpractice damages award?

Appellant's brief, at 3.

Appellant first argues that it is entitled to a judgment n.o.v. on the punitive damages claim because it is in derogation of both controlling federal constitutional law and Pennsylvania law. Appellant argues that both federal due process and Pennsylvania law require that a claim for punitive damages must be based upon the conduct causing the specific injury for which liability is being asserted and not upon unrelated conduct occurring post-injury.

Initially, we note that

> Our standard of review of an order denying judgment n.o.v. is whether, reading the record in the light most favorable to the verdict winner and granting the benefit of every favorable inference, there is sufficient competent evidence to support the verdict. Any conflict in the evidence must be resolved in favor of the verdict winner. Judgment n.o.v. may be granted only in clear cases where the facts are such that no two reasonable minds could fail to agree that the verdict was improper.

*Hart v. O'Malley*, 781 A.2d 1211, 1218-1219 (Pa. Super. 2001) (citations omitted). Furthermore,

> [t]he purpose of punitive damages is to punish outrageous and egregious conduct done in a reckless disregard of another's rights; it serves a deterrence as well as a punishment function. Therefore, under the law of this Commonwealth, a court may award punitive damages only if an actor's conduct was malicious, wanton, willful, oppressive, or exhibited a reckless indifference to the rights of others.

*Hall v. Jackson*, 788 A.2d 390, 403 (Pa. Super. 2001) (quoting *Johnson v. Hyundai Motor America*, 698 A.2d 631, 639 (Pa. Super. 1997) (citations omitted)). "Conversely, punitive damages may not be awarded for misconduct which constitutes ordinary negligence such as inadvertence, mistake and errors of judgment." *Id.* (citing *McDaniel v. Merck, Sharp & Dohme*, 533 A.2d 436, 447 (Pa. Super. 1987) (citation and quotation marks omitted)).

The facts with respect to the punitive damages claim concern the Hospital's conduct in attempting to cover-up the true facts surrounding Mr. Gallagher's oxygen deprivation by altering and withholding medical records for the relevant time period. Specifically, the trial court notes:

> In this case, over a period of approximately two and one-half years, [Appellees'] counsel conducted extensive pre-trial discovery. During that time—and in fact until just days before trial began—[Appellees'] counsel had been falsely advised that he had received copies of all medical records relevant to the case, and that those records had not been altered in any respect.
>
> In fact, the [Hospital] had repeatedly failed to advise [Appellees'] counsel that certain entries on Gallagher's critical care "flowsheet" for the

> evening of June 7, 2000 had been "whited out" and rewritten, that the original flowsheet had been removed from the file and replaced with a copy, and that the original flowsheet was stored in a safe located in the office of the [Hospital's] Risk Manager. The [Hospital] had falsely claimed, in response to numerous discovery requests, that the original flowsheet had been misplaced, and could not be located.
>
> When [Appellees'] counsel learned for the first time—and contrary to earlier representations—that the [Hospital] indeed possessed the original flowsheet, he sought—and received—leave of Court to amend the Complaint to add a claim for punitive damages *stemming from the [Hospital's] apparently-deliberate failure to produce the original record, and the [Hospital's] repeated (and false) representations that it could not be located.*

Trial Court Opinion, 8/23/04, at 4-5 (footnote omitted).

We agree with Appellant's contention that a defendant's acts that are independent from the conduct on which liability is premised may not serve as the basis for punitive damages. Instantly, Appellees concede that they are not claiming punitive damages for the Hospital's negligent monitoring of Mr. Gallagher, which led to his oxygen deprivation and resultant brain damage. Rather, they asserted an independent claim for punitive damages premised upon the allegedly outrageous conduct of altering and withholding the medical records in an attempt to stymie Mr. Gallagher's guardians from successfully obtaining redress for his injury by tampering with the discovery of the facts necessary for prosecution of his medical malpractice lawsuit. While this conduct is relevant to show after the fact awareness of negligence on the hospital's part, it does not, however, relate to the conduct alleged to have been negligent, which actually

caused the injury. While the conduct surrounding the alleged withholding of certain medical records and the whiting out of portions of other records, if true, is undoubtedly reprehensible, none of these facts, however, relate to the malpractice being litigated. Nor do these facts assert a separate cause of action sounding in tort.

Appellees' argument to the contrary that a claim for punitive damages may be made even in the absence of physical injuries misses the point. They fixate on the element of damages without looking at the bigger picture, that being, the predicate upon which the damages are based. "The right to punitive damages is a mere incident to a cause of action, an element which a jury may consider in making its determination and not the subject matter of the action in itself." *Weider v. Hoffman*, 238 F. Supp. 437 (W.D. Pa. 1965). The Restatement of Torts defines damages to mean "a sum of money awarded to a person *injured by the tort of another.*" Restatement (Second) of Torts, § 902 (emphasis added). Thus, without a cause of action there can be no damages of any kind. As both Section 505 of the MCARE Act, 40 P.S. § 1303.505(a), and the cases cited by Appellees, which allow assessment of punitive damages, are dependant upon a valid assertion of a cause of action in tort, Appellees' reliance thereon is misplaced. Accordingly, we find the trial court erred in denying Appellant's motion for judgment n.o.v. on the issue of punitive damages.

Appellant next argues that it is entitled to a new trial on the medical malpractice claim because it was prejudiced by the inclusion of the claim for punitive damages. In reviewing a refusal to grant a new trial, our examination is limited to a determination of whether the trial court committed an error of law that controlled the outcome of the case or committed an abuse of discretion. *Fanning v. Davne*, 795 A.2d 388, 393 (Pa. Super. 2002), *appeal denied*, 573 Pa. 697, 825 A.2d 1261 (2003).

> An abuse of discretion is not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the judgment is the result of partiality, prejudice, bias or ill-will, as shown by the evidence of record, discretion is abused. We emphasize that an abuse of discretion may not be found merely because the appellate court might have reached a different conclusion, but requires a showing of manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support as to be clearly erroneous.

*Fanning* at 393 (quoting *Paden v. Baker Concrete Construction Co., Inc.*, 540 Pa. 409, 412, 658 A.2d 341, 343 (1995)).

In this regard, Appellant argues that the jury's award of compensatory damages was tainted by the inclusion of the evidence related to the punitive damages claim. We disagree.

Initially, we note that all the evidence concerning the alleged cover up, which Appellant now complains tainted the jury, was relevant to liability and was admitted without objection by Appellant before the Appellees orally requested an amendment of the complaint to include a claim for punitive damages. Therefore, Appellant's post-verdict argument that this evidence should not have been admitted or was somehow misused has been waived. Moreover, even if not waived, we can discern no taint in the jury's deliberations during the compensatory phase of the case. The trial court was careful to bifurcate the punitive damages claim from the compensatory claim. The jury did not hear any evidence in the compensatory phase that they would not have otherwise heard had there been no punitive damages claim. Furthermore, the amount of the compensatory damages, while significant,

was still seven million dollars less than the asserted economic damages submitted into evidence by the Appellees.

As explained by the trial court:

> [P]unitive damages were not tried together with the compensatory claims. There was no reasonable method by which the fact that white-out had been applied to the flowsheet could have been excluded from the evidence presented in support of the [Appellees'] claims for compensatory damages; the mere admission of this evidence in the compensatory portion of the case does not constitute trial of the punitive damages claim, and indeed, the [Appellant] does not argue otherwise.
>
> Even though the document was ultimately produced, the use of "white-out" (a violation of the hospital's own policy) made it impossible to be certain what the original entries had said. Accordingly, the [trial court] gave the jury an "adverse inference" charge, advising them that they could assume, for the purposes of their deliberations, that the unreadable entries would have contained information unfavorable to the defense.
>
> That being so, the *only* evidence relevant to the punitive damages claim that was *irrelevant* to the compensatory damages claim was evidence of the [Appellant's] net worth, and—in recognition of the fact that wealth evidence can taint a compensatory award—no evidence on that point was given to the jury until after it had returned a verdict on the compensatory claims. In fact, though the [Appellant] contends that the

> punitive damages claim "tainted" the jury's deliberation on compensatory damages, the [Appellant] had not identified a single piece of evidence that it claims should have been excluded from the compensatory damages phase of the case of that basis.
>
> On the initial verdict sheet, the jury was asked only a threshold question pertaining to punitive damages—was the conduct of Temple University Hospital [after the injury had occurred] willful or wanton or the reckless indifference to the rights of Hugh Gallagher—and only after it returned a compensatory verdict and answered this question in the affirmative was evidence presented on the punitive damages claim itself. Had the jury found that the [Appellant] had not been negligent, that such negligence had not been a substantial cause of Gallagher's injuries, or that Gallagher had suffered no compensable damages, this "threshold question" would never have been reached.

Trial Court Opinion, 8/23/04, at 6-7 (footnotes omitted). Thus, we would find the amendment to allow a claim for punitive damages based upon post-injury conduct was harmless. *See Harman v. Borah*, 562 Pa. 455, 756 A.2d 1116 (2000) (restating the general proposition that even where error is committed a new trial is not warranted unless the complaining party demonstrates that they were prejudiced by the error).

In light of our disposition reversing the denial Appellant's request for judgment n.o.v. on punitive damages, there is no need to consider Appellant's arguments regarding the trial court's refusal to instruct on vicarious liability in connection with punitive damages.

Finally, we turn our attention to Appellant's contention that the trial court erred in failing to investigate the possibility of juror confusion after rendering its verdict. Here, Appellant attempts to invoke one of the limited exceptions to the no impeachment rule. Specifically, Appellant argues that the jury proceeded on a mistake of law or fact. We disagree.

After the verdict was announced the jury was polled with unanimous results, and the verdict was recorded. The trial court then advised the jurors that because of their answer to interrogatory number 4 their duties were not completed as they would have to return Monday morning to consider an award of punitive damages. At this point the jury foreperson expressed concern stating "I think the verdict that we came to, because we half on one and half on the other, the question—." N.T., 10/24/03, at 57. Before the juror could complete the statement the court interrupted and explained that a hearing to determine the amount, if any, for punitive damages was still necessary and recessed the jury until Monday. The following colloquy then took place:

> MR. FITZPATRICK [(Appellant's counsel)]: I move for a mistrial. Based on the foreperson's statement, I believe what she was telling the Court was that they had already considered punitive damages in their deliberation. That's why I don't believe that punitive damages are in the case. I argued that all along. Now we've got a jury that clearly from her statement they already put that in a verdict, which they shouldn't have, and now you're going to send them out again to decide that they add more to it. I move for a mistrial.
>
> MR. SPECTER [(Appellee's counsel)]: Judge, that's not a fair inference from the fragment that the juror spoke. As I recall, what she

> said was, she said we were half and half, and I stood up to interpose an objection, because the jurors' deliberations are specifically sacrosanct and what they were discussing at some previous time may not be inquired into.
>
> THE COURT: They can't impeach their own verdict.
>
> MR. SPECTER: Correct. If they determine that no punitive damages are warranted, they will come back and award zero dollars. They have the right.
>
> MR. FITZPATRICK: I still feel that Your Honor instructing they have to come back on damages.
>
> MR. SPECTER: As a matter of fact, the Court must instruct that they are not required to enter an amount of damages. They can decide to award no punitive damages if they think it's appropriate.
>
> THE COURT: Motion for mistrial is denied.

*Id.* at 58-59.

We reject Appellant's self-serving interpretation that this partial utterance by one juror shows that the jury awarded punitive damages as part of the compensatory award. The juror's statement at best is ambiguous and could have just as easily have been interrupted to indicate that the jury had difficulty in reaching a consensus on liability or the amount of compensatory damages. In any event, the deliberative process is not to be inquired into in the absence of evidence of clear confusion.

Unlike the case of *Francis v. Coughlin*, 755 F. Supp. 618 (S.D.N.Y. 1991), relied upon by Appellant, there simply is no evidence of jury confusion in this case. We note that the verdict slip here was unambiguous and required the jury to find liability and make an award for

compensatory damages before reaching the threshold question pertaining to punitive liability, which simply asked "Was the conduct of Temple University Hospital willful or wanton or with reckless indifference to the rights of Hugh Gallagher, IV?" Here, unlike in the *Francis* case, there was no mention of punitive damages during the compensatory phase nor did the jury send the court a question during deliberations that indicated they were considering punitive damages in the compensatory phase. Consequently, the trial court properly determined that a new trial was not warranted.

Moreover, we find Appellant's reliance on *Drum v. Shaull Equipment and Supply Co.*, 787 A.2d 1050 (Pa. Super. 2001), *Pa. Dep't of Transp. v. Nemiroff*, 401 A.2d 10 (Pa. Cmwlth. 1979), and *Leopold v. Davies*, 369 A.2d 868 (Pa. Super. 1977), for the proposition that it is proper for a trial judge to investigate or question the jury verdict where it appears that the jury has proceeded on a mistake of law or fact is misplaced. Those cases hold that new trial is warranted where "a jury is clearly confused, and the trial court cannot rectify the confusion by appropriate instructions." *Drum*, 787 A.2d at 1058 (citing *Nemiroff*, 401 A.2d at 12). They do not stand for the proposition that a judge may properly "investigate" into the jury's deliberative process to determine how they reached their verdict. Here, the verdict announced in court was consistent with the verdict slip, and the individual jurors were polled with unanimous results. Accordingly, we find no error in the trial court's refusal to investigate any alleged confusion.

Appellant's reliance upon *Smith v. Snowden Township*, 348 Pa. 187, 34 A.2d 515 (1943), is likewise unavailing. *Smith* does not stand for the proposition Appellant would have this Court believe. *Smith* is merely reflective of the disfavor the courts of this Commonwealth hold for sealed verdicts. Instantly, we are not dealing with a sealed verdict where jurors are separated and later

return to announce their verdict. As previously addressed there was no separation of the jury prior to the announcement of their verdict, and there was no juror dissent to the verdict upon polling. Thus, no further inquiry by the court was necessary.

Finally, we find that Appellant waived his assertion that the trial court erred in striking the affidavits of counsel who questioned two of the jurors in an *ex parte* meeting after the verdict. As the Appellees point out, during oral arguments on the post-trial motions, their counsel argued that Appellant's counsel acted improperly in obtaining these affidavits, and Appellant's counsel responded by consenting to the striking of the affidavits. Specifically, counsel stated "We don't need to get to the affidavits at all. If you want to remove the affidavits from the brief, it's okay with me because granting the amendment and allowing Interrogatory No. 4 and allowing Mr. Specter to argue what I just read to you, that was fundamental error. We don't need the affidavits about what the jurors said afterwards." N.T. Post-Trial Motions, 1/20/04, at 50. Accordingly, Appellant cannot now be heard to complain.

Even if not waived, the affidavits were properly stricken since they constituted hearsay recollections of what those jurors allegedly told the affiants rather than the sworn statements of the jurors.

Judgment on the verdict with respect to liability for medical malpractice and compensatory damages affirmed. Judgment on the verdict with respect to punitive damages reversed.

Judgment Entered.

/s/
Prothonotary

Date: _____

**IN THE COURT of COMMON PLEAS - PHILADELPHIA COUNTY FIRST JUDICIAL DISTRICT of PENNSYLVANIA CIVIL TRIAL DIVISION - LAW**

**HUGH B. GALLAGHER , III and JOANNE GALLAGHER, guardians of the estate of HUGH B. GALLAGHER, IV**

**Plaintiffs**

**vs.**

**TEMPLE UNIVERSITY HOSPITAL**

**Defendant**

**APRIL TERM, 2001**
**No. 2643**

## OPINION OF THE COURT

**AUGUST 23rd, 2004**
**BONAVITACOLA, S.J.**

## INTRODUCTION

In May, 2000, Hugh B. Gallagher, IV, then age 19 (hereinafter, "Gallagher") was admitted to the burn intensive care unit ("BICU") at Temple University Hospital, after suffering severe, self-inflicted burns in an unsuccessful suicide attempt. The BICU contained seven beds, and on the evening of June 7, 2000, three nurses were on duty in the unit. Nurse Janet Lawson was assigned to be Gallagher's nurse, and Gallagher was the only patient for whom she was responsible that evening.

Because Gallagher was having trouble breathing independently, he had a tracheotomy in place, which

placed him at risk that a mucous or blood clot would block his airway. This required that he be suctioned at least once an hour, and was the most important reason that he had to be monitored.

At approximately 11:40 PM, Gallagher's airway became blocked, and he was unable to breathe. No one responded to his alarm for a period of between four and ten minutes, and by the time that Gallagher's condition was discovered, he was pasty white, had no heart rate, and was not breathing. Though he was resuscitated, there is no dispute that Gallagher suffered severe brain injury from loss of oxygen caused by the delay in responding to his alarm.

As a result, Gallagher (who had been a student at Penn at the time of his hospitalization) will never again live independently. He will likely never be able to hold a job, and will require the care of others for the rest of his life. He has difficulty walking and maintaining his equilibrium.

Gallagher's parents, his guardians, brought suit against Temple University Hospital for negligence. At trial, this Court allowed the Plaintiffs to amend their Complaint to add a claim for punitive damages (the facts giving rise to which will be discussed later in this opinion), and after an eight-day trial (from which the punitive damages claim was bifurcated), the jury returned a compensatory verdict of twenty million dollars.

The parties then presented additional evidence on the issue of the Defendant's net worth, after which the jury was charged on punitive damages. The jury again retired to deliberate, after which it returned an additional award of $15,000.00 in punitive damages.

The Defendant's post-trial motions were denied, and delay damages were awarded; the Plaintiffs then

praeciped for judgment, and the Defendant filed a Notice of Appeal.

## DISCUSSION

### A. The Jury Verdict Was Not Excessive and was Supported by Ample Evidence

Unquestionably, Temple University Hospital owed a duty of reasonable care to Hugh Gallagher on the evening of June 7, 2000.

It is beyond reasonable dispute that the care provided to Gallagher by Temple University Hospital on that evening fell below the applicable standard, and that this breach of the standard of care caused Gallagher to suffer severe brain damage from lack of oxygen.

The testimony established that:

- Gallagher required (and had) one-on-one nursing care on the night of June 7, 2000, because he was at risk for obstruction of his airway, and needed frequent suctioning;
- The BICU's records indicated that, at the time that Gallagher's alarm sounded, no life-threatening events were occurring with any of the other three patients in the unit, but that nonetheless, all three nurses assigned to the unit were in another patient's room, providing care of a non-emergent nature;
- The simultaneous presence of all three assigned nurses in a single room violated the hospital's own policies, and represented a deviation from the applicable standard of care;
- At the time of the incident, Gallagher was connected to monitors for heart rate, respiration, blood oxygen and blood pressure;
- The normal level of blood oxygenation is 99% or above, and Gallagher's monitoring

equipment was configured to sound an alarm if the blood oxygen level fell below 90%;

- At 11:41:19 PM, Gallagher's blood oxygen level was 28%, implying that it had fallen below 90% one to two minutes earlier[1] at which point his alarms would have begun to sound;
- At 11:41:19 PM, Gallagher's pulse rate was measured at 43; the monitor was configured to sounded an alarm when the rate dropped below 60;
- No one responded to Gallagher's alarms until 11:45 PM, five or six minutes after they had first sounded; at that point, he was pasty-white, was not breathing, and had no measurable pulse;
- The failure of the BICU nurses to respond to Gallagher's alarms for a period of five to six minutes represented a deviation from the applicable standard of care; and
- Lack of oxygen for a period of five to six minutes typically results in brain damage of the type sustained by Gallagher.

From these facts, the jury was amply entitled to find that the Defendant had negligently rendered care to Gallagher on the evening of June 7, 2000, that Gallagher had suffered severe hypoxia as a result, and that such negligence was a substantial factor in causing his brain damage. The law requires no more to support a negligence verdict.

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[1] Monitoring records for this earlier point in time were not produced by the Defendant, and were thus presumably destroyed. For this unexplained lapse, and for the spoliation of another document (discussed later in this opinion) the jury was given "adverse inference" instructions.

The Plaintiffs presented unrebutted evidence to establish that Gallagher's remaining life expectancy was 53.9 years, and that his future medical care over that period would cost $6,234,716.00.

The Plaintiffs' witness also testified—without contradiction—that because the cost of medical care has been increasing faster than the rate of inflation, it would require $12,933,159.00 in present-day dollars to purchase that care in the future.

The Plaintiffs also introduced evidence to establish that Gallagher's lost earning capacity over the remainder of his life fell between $3,228,413.00 and $13,854,761.00 (between $59,896.35 and $257,045.66 annually), and that his family had already incurred approximately $600,000.00 in medical bills.

The punitive damages award—$15,000.00, or just six one-thousandths of one percent of the defendant's net worth—is also reasonable, and appropriate to the facts adduced.

In light of these figures, the jury's verdict was well within reasonable limits, and was sufficiently supported by the record. The award does not shock the Court's conscience, and should not be disturbed.

**B. The Punitive Damages Claim was Properly Handled**

Section II(A) of the Defendants' post-trial is entitled, "Permitting punitive liability into this case, and trying that issue with compensatory liability and damages ... requir[es] judgment notwithstanding the verdict as to punitive damages and a new trial on liability."

The premise of this section heading is incorrect in several key respects. First, there is no requirement in Pennsylvania law that all claims in a single lawsuit arise from a single wrong.

In this case, over a period of approximately two and one-half years, the Plaintiffs' counsel conducted extensive pre-trial discovery. During that time—and in fact just days before trial began—the Plaintiffs' counsel had been falsely advised that he had received copies of all medical records relevant to the case, and that those records had not been altered in any respect.

In fact, the Defendant had repeatedly failed to advise the Plaintiffs' counsel that certain entries on Gallagher's critical care "flowsheet" for the evening of June 7, 2000 had been "whited out" and rewritten, that the original flowsheet had been removed from the file and replaced with a copy, and that the original flowsheet was stored in a safe located in the office of the Defendant's Risk Manager. The Defendant had falsely claimed, in response to numerous discovery requests, that the original flowsheet had been misplaced, and could not be located.

When the Plaintiffs' counsel learned for the first time—and contrary to earlier representations—that the Defendant indeed possessed the original flowsheet, he sought—and received—leave of Court to amend the Complaint to add a claim for punitive damages *stemming from the Defendant's apparently-deliberate failure to produce the original record, and the Defendant's repeated (and false) representations that it could not be located.*[2]

Though the Defendant argues that the Medical Care and Reduction of Error Act (40 P.S. § 1301, *et seq)*[3]

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[2] At trial, the parties stipulated that the missing documents had been withheld by the Defendant itself, and not by the Defendant's attorneys.

[3] Though the Mcare Act was not enacted until 2002, the language of the punitive damages statute previously in effect is identical for the purposes of this analysis.

precludes an award of punitive damages on these facts, the language of the statute indicates otherwise:

> "Punitive damages may be awarded for conduct that is the result of the health care provider's willful or wanton conduct or reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the health care provider's act, the nature and extent of the harm to the patient that the health care provider caused or intended to cause and the wealth of the health care provider." (40 P.S. § 1301.812-A, repealed and replaced by 40 P.S. § 1301.505, *eff.* March 20, 2002).

The punitive damages claim in this case arises not from any aspect of the care rendered to Gallagher by the Defendant; rather, it arises from the hospital's post-injury actions, which a jury could reasonably find were part of a course of conduct intended to prevent the Plaintiffs from discovering the full extent of the Defendant's negligence on the evening of June 7, 2000, and thereby to reduce or eliminate the likelihood of an adverse jury verdict.

Such conduct falls well within the scope of the statutory provision quoted above, and that the Court properly allowed the requested amendment, and properly submitted the issue to the injury.

Second, punitive damages *were not* tried together with the compensatory claims.

There was no reasonable method by which the fact that white-out had been applied to the flowsheet could have been excluded from the evidence presented in support of the Plaintiff's claims for compensatory

damages[4]; the mere admission of this evidence in the compensatory portion of the case does not constitute trial of the punitive damages claim, and indeed, the Defendant does not argue otherwise.

Even though the document was ultimately produced, the use of "white-out" (a violation of the hospital's own policy) made it impossible to be certain what the original entries had said. Accordingly, the Court gave the jury an "adverse inference" charge, advising them that they could assume, for the purposes of their deliberations, that the unreadable entries would have contained information unfavorable to the defense.

That being so, the *only* evidence relevant to the punitive damages claim that was *irrelevant* to the compensatory damages claim was evidence of the Defendant's net worth, and—in recognition of the fact that wealth evidence can taint a compensatory award—no evidence on that point was given to the jury until *after* it had returned a verdict on the compensatory claims. In fact, though the Defendant contends that the punitive damages claim "tainted" the jury's deliberation on compensatory damages, the Defendant has not identified a single piece of evidence that it claims should have been excluded from the compensatory damages phase of the case on that basis.

On the initial verdict sheet, the jury was asked only a threshold question pertaining to punitive damages—was the conduct of Temple University Hospital [*after* the injury had occurred][5] willful or wanton or with reckless

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[4] The Plaintiff were completely entitled to explore the circumstances under which the record had been whited-out, to learn its original contents if possible, and to support their request for an "adverse inference" charge if not.

[5] Though the question on the verdict sheet did itself not contain the bracketed phrase; I specifically informed the jury,

indifference to the rights of Hugh Gallagher—and only after it returned a compensatory verdict and answered this question in the affirmative was evidence presented on the punitive damages claim itself.[6] Had the jury found that the Defendant had not been negligent, that such negligence had not been a substantial cause of Gallagher's injuries, or that Gallagher had suffered no compensable damages, this "threshold question" would never have been reached.

Under the circumstances, bifurcation of the punitive damages claim from the remainder of the trial in this particular manner was the most appropriate means of preserving the rights of both the Plaintiffs and the Defendant.

Because the premises set forth by the Defendant (that the punitive damages claim was improperly allowed into the case, and that the claim, once allowed, was improperly handled) are incorrect, the Defendant's conclusion—that post-trial relief is required—is logically (and factually) unsupported.

### C. We Properly Refused to Question the Jury After the Verdict was Recorded

The jury returned its verdict on compensatory damages on a Friday afternoon. After the verdict was taken, the jury polled and the verdict recorded, I told the jurors that they would have to return on Monday to

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immediately before it retired to deliberate, that this question pertained only " ... to anything that may have occurred after the injury was sustained. Not before, after." (N.T., 10/24/03, at 41).

[6] The only additional evidence offered by the Plaintiffs in support of their punitive damages claim was the Defendant's net worth, which as read into the record by agreement. (N.T. 10/27/03, at 23).

consider an award of punitive damages. The jury foreperson then indicated concern, and when I asked the nature of the difficulty she said, "...I think the verdict that we came to, because we half on one and half on the other, the question—" but I interrupted her at that point, and released the jury until the following Monday morning. The defense immediately moved for a mistrial, which was denied.

"Jurors may not impeach their own verdict by testifying to what occurred during deliberations." *Boring v. LaMarca,* 435 Pa. Super. 487; 646 A.2nd 1199 (1994); *Carter by Carter v. U.S. Steel Corp.,* 529 Pa. 409; 604 A.2nd 1010 (1992). The only exception to this rule is when a claim is made that the jury was affected by "extraneous influences" which might have prejudiced their deliberations; in such cases, the court may inquire into the *existence* of the extraneous influences, but not as to the *effect* of such influences on the ultimate verdict. *Boring, supra.* In other words, jurors are not competent to testify as to what occurred during deliberations. *Carter, supra.*

> "In the course of a jury's deliberation, each juror weighs countless factors many of which he may not consciously be aware he is even considering. This is a rubric of life. Whenever a choice must be made, few men come to a decision on the basis of one factor alone, but only after weighing all the conflicting variables which inhere in the choice. '(B)eing personal to each juror, the working of the mind of any of them cannot be subjected to the test of other testimony, and therefore * * * such testimony should not be received to overthrow the verdict to which all assented.' *State [of NJ] v. Kociolek,* 20 N.J. 92; 118 A.2nd 812, at 816 (1955).

> "The logic of Mr. Justice William J. Brennan, Jr., (then a member of the New Jersey Supreme Court) in the *Kociolek* case is persuasive."
>
> *Commonwealth v. Zlatovich*, 440 Pa. 388; 269 A.2nd 469 (1970).

It is therefore of no concern whatsoever that the jury foreperson's comment might have been directed to the verdict that had just been recorded; even if she had finished her sentence, it would have provided no basis upon which a new trial properly have been granted.

The decision to deny the motion for mistrial was thus entirely correct.

### D. The Jury Charge was Proper and the Plaintiffs' Summation was Appropriate

The Defendant's remaining allegations of error are directed to the Plaintiff's summation and to the jury charge; each will be discussed in turn.

#### 1. The Plaintiff's Summation was Proper and No Mistrial was Warranted

During his summation, the Plaintiff's attorney made the following statement regarding the last-minute production of the supposedly-lost flowsheet, which elicited an immediate objection and a motion for mistrial from defense counsel:

> MR. SPECTER: "And this risk manager for the Temple Health System, whose risk is she managing? The patient's risk or the hospital's risk? What does she tell us? It's absolutely staggering. She tells us she that, oh yeah, I took the original record. It's the only one, took it from a foot-thick chart, took it to my office, Mr. Specter, Mr. Youman, for the original, never gave it to my lawyers. Mr. Fitzpatrick gets up and utters a stipulation that his office

> was told by her office that they couldn't find the original. They had the original. They had it. She said they had it. She said she knew they had it. He's going to tell you, well, we brought it into court.. Don't be too hard on us. Folks, use your life experience, what you know about the way the world works. You know most cases never ends *[sic]* up in court. They never go to a jury trial. What were they hoping? They were hoping this case would go away—"
>
> MR. FITZPATRICK: "Objection, your Honor."
>
> THE COURT: "Sustained."
>
> MR. FITZPATRICK: "I move for a mistrial."
>
> THE COURT: "Denied"
>
> (N.T., 10/23/03, at 43-44).

"Counsel usually has great latitude in his closing argument, [but] he may not present facts to the jury not in evidence, and that are prejudicial to the opposing part." *Millen v. Miller*, 224 Pa. Super. 569; 308 A.2nd 115 (1973).

Here, the evidence easily supports the inference that the Defendant withheld the original flowsheet in an effort to protect its own interests, believing that—by doing so—it would make the case easier (and likely less costly) to resolve. On this particular record, the defense objection presented a fairly close call, and might properly have been overruled. In context, the Court did not believe that the quoted statement was so patently prejudicial as to require that a mistrial be granted, and does not now believe that it warrants the award of a new trial.

**2. The Sudden Emergency Doctrine Has No Application Here**

The defense next complains that the Court should have charged on the "sudden emergency doctrine" as set

forth in *Lockhart v. List*, 542 Pa. 141; 665 A.2nd 1176 (1995) and that the failure of the Court to do so constitutes reversible error. The defense is incorrect.

The sudden emergency doctrine is a creature of motor vehicle cases. Where applicable, it appears to relax the duty owed by the operator of a motor vehicle who is "... confronted with a sudden and unexpected position of peril created in whole or in part by someone other than ..." the person asserting the doctrine. *Carpinet v. Mitchell*, 2004 Pa. Super. 197; 853 A.2nd 366 (May 27, 2004). In reality, the duty is not relaxed; the sudden emergency doctrine is merely an articulation of the fact that—in the face of an unexpected emergency—less may be required of a reasonable person than might otherwise be the case.

A hospital burn intensive care unit (indeed, a hospital generally) is a place where sudden emergencies happen regularly. Physicians and other health care providers are held to a standard of care that contemplates that such emergencies can and will occur, and that they will be responded to in a reasonably appropriate manner.

The sudden emergency doctrine simply has no application to a medical malpractice case, as its effect would be to improperly diminish the duty of care owed to a plaintiff by reason of an event for which the health care provider should have been fully prepared; indeed, there is no reported Pennsylvania malpractice case in which this doctrine was applied.

The decision to refuse to charge on this doctrine was thus entirely correct.

### 3. No Charge on Vicarious Liability was Necessary

Awards of punitive damages in medical malpractice cases based upon vicarious liability are restricted by 40 P.S. § 1303.505(c)[7] which reads as follows:

> "(c) Vicarious liability—Punitive damages shall not be awarded against a health care provider who is only vicariously liable for the actions of its agent that caused the injury unless it can be shown by a preponderance of the evidence that the party knew of and allowed the conduct by its agent that resulted in the award of punitive damages."

Here, the original flowsheet was admittedly removed from Gallagher's file by the Defendant's director of risk management, who replaced it with an altered copy and held the original in a sealed envelope in her office safe. When a high-level official of a corporate defendant takes such an obviously inappropriate action, it is proper—particularly in the absence of evidence to the contrary—to assume that she did so with at least the tacit approval of, and possibly even at the direction of, senior management.

On the facts of this case—which are probably as damning as such facts come—no further proof of the hospital's culpability was necessary, and no error was committed by not requiring it.

## CONCLUSION

For the reasons detailed above, no error occurred during this case to warrant post-trial relief. Accordingly,

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[7] Here, because the withholding of the document continued from the time that it was first requested until the very first day of trial, it is unclear whether the current statute, 40 P.S. § 1303.505(c), or the prior statute, 40 P.S. § 1301.812-A(c) applies; fortunately, for the purposes of this analysis, the statutes are identical.

my decision to deny that relief should be affirmed, and the jury's verdict upheld.

BY THE COURT:

Bonavitacola, S.J.

71

No. 07-422

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SUPREME COURT, U.S.

# In The Supreme Court of the United States

TEMPLE UNIVERSITY HOSPITAL,

*Petitioner,*

v.

HUGH B. GALLAGHER, *et al.*,

*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF PENNSYLVANIA
PITTSBURGH OFFICE

## BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether this Court lacks jurisdiction under *Michigan v. Long*, 463 U.S. 1032 (1983), where the Pennsylvania courts affirmed a compensatory damages judgment on state-law grounds that are adequate and independent of federal law?

2. Whether the principles enunciated in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), are even implicated when (a) evidence regarding a defendant's post-malpractice effort to alter and conceal medical records is admitted without objection and the evidence is relevant to negligence and causation, (b) no evidence is admitted during trial regarding the defendant's conduct toward non-parties, (c) the jury unanimously awards compensatory damages in an amount significantly less than the evidence would have permitted, and (d) in the second phase of a bifurcated trial, the jury awards only $15,000 in punitive damages, a judgment later reversed by the Pennsylvania courts under Pennsylvania law?

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## INTRODUCTION

The writ of certiorari is reserved for those cases that involve fundamental or urgent issues of federal law. This petition presents neither. It does not even present an issue of federal law. Rather, it represents the latest chapter in a tortfeasor's effort to postpone responsibility for its neglect that caused a catastrophic brain injury to a college student. Rather than accepting that the large compensatory verdict was a function of its proven neglect and the devastating injuries suffered by Hugh Gallagher, IV, Temple University Hospital ("Temple") now supposes that the verdict must in actuality have represented an improper award of punitive damages. Temple's latest effort to manufacture appellate issues should be rejected and the petition denied.

In fact, the jury did assess $15,000 in punitive damages against Temple in a second phase of trial for Temple's post-malpractice efforts to alter key medical records and then hide those records until trial. On appeal, however, the Pennsylvania Superior Court reversed the punitive damages judgment under the Pennsylvania law that a post-incident cover-up does not give rise to a claim for punitive damages. At the same time, the Superior Court affirmed the compensatory judgment because, *inter alia*, all evidence related to the altering and hiding of records had been properly admitted without objection *before* Plaintiffs sought leave to amend their complaint to plead punitive damages. The Superior Court twice affirmed the compensatory verdict under Pennsylvania law. The Pennsylvania Supreme Court twice declined to alter those rulings.

Temple now seeks to characterize this case as involving multiple issues of federal constitutional law – it says the allowance of the punitive damages claim violated this Court's decision in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), and hence a "structural error" occurred mandating a new trial under *Arizona v. Fulminante*, 499 U.S. 279, 306-08 (1991), and otherwise the Superior Court misapprehended the proper method for evaluating trial error. These arguments mistake the holdings in these cases in an effort to manufacture constitutional issues. An analysis of what this Court actually held in those cases, in the context of what actually occurred below, demonstrates that the petition lacks merit and should be denied.

## STATEMENT OF THE CASE

### A. Temple's neglect caused a catastrophic brain injury.

This is a medical malpractice case arising out of care provided to Hugh Gallagher, IV, then aged 19, in the Temple University Hospital Burn Intensive Care Unit (BICU) on June 7, 2000. Hugh had been a student at the University of Pennsylvania and had intended to pursue a career in medicine. Pennsylvania Superior Court Joint Reproduced Record ("Pa. Rec.") 637-38, 938. During his summer break, he suffered severe burns in an apparent suicide attempt and was admitted to the BICU for treatment. Hugh had a tracheotomy in place because he was having difficulty breathing independently and was at risk for airway compromise from a mucous or blood clot. Pa. Rec.

116-17. The nurses responsible for Hugh knew that he was at risk for airway compromise, and that Hugh required suctioning at least every hour and as needed to ensure that he had a functioning airway. Pa. Rec. 116-17, 926-28.

Because of his risk for airway compromise, Hugh received "one-to-one" nursing care, meaning that the nurse responsible for Hugh was assigned solely to him and had no other patient responsibilities. Pa. Rec. 113-15. On June 7, 2000, that one to one nurse was Janice Lawson. *Id.* The two other nurses on duty that night were responsible for the only three other patients in the unit. *Id.*

At approximately 11:40 p.m., Hugh's airway became plugged and he was unable to breathe. His vital signs began to decline, causing his alarms to sound both in Hugh's room and out at the BICU's central nurse's station. Pa. Rec. 116-18, 191-98. Despite the facts that Hugh had a one-to-one nurse solely responsible for him, and that the two other nurses on the unit were responsible for only three other patients, nobody responded to Hugh's alarms for a period of four to ten minutes. Pa. Rec. 506-08, 924. During that time, Hugh was unable to breathe due to the blockage of his airway.

At trial, Temple would attempt to explain the failure of the nurses to respond to Hugh's alarms by claiming that there were critical patient emergencies occurring in nearby rooms in the unit such that they did not know that Hugh's alarms were sounding. Pa. Rec. 915-19. The records of the patients in these rooms showed that no emergencies had occurred.

Pa. Rec. 165-67, 285-86, 494-98. The only life-threatening event to occur that night was Hugh Gallagher's blocked airway. Pa. Rec. 497-98.

By the time Hugh was discovered, he was pale, had no heart rate and was not breathing. Pa. Rec. 241-42. Although he was ultimately resuscitated, he suffered a severe anoxic brain injury as a result of the delay in responding to his alarms. Pa. Rec. 506-09.

Hugh has been institutionalized since that day. He cannot live independently. He cannot accurately recite the day of the week. His cognitive and memory deficits are so severe that he will never be able to hold a job and will always require the care of others. He has significant gait and balance dysfunction and other physical injuries as a result of his brain injury. Pa. Rec. 551-52, 564-70, 703-04. No compensation was sought for his burns, from which he has recovered.

**B. The resulting compensatory damages.**

The brain injury caused by Temple's negligence resulted in a substantial compensatory damages verdict because the jury heard undisputed evidence that Hugh Gallagher will have to live in a supervised setting and receive medical care for the rest of his life and because of his resulting loss of earnings and earnings capacity. The economic damages alone were as high as $27,387,920. These economic damages were divided into three categories: 1) past medical expenses; 2) future

medical and custodial expenses; and 3) loss of earnings and earning capacity.

Past medical expenses totaling $600,000 were stipulated. Pa. Rec. 767-68. As to future medical and custodial care, an economist and life care planner gave uncontested testimony that the costs of such future care would be as much as $12,933,159. Pa. Rec. 587-88; 737-38. Hence the uncontested economic damages exceeded $13,500,000.

The only contested element of economic damages was loss of earnings and earning capacity. The disagreement had to do with what level of education and training Hugh Gallagher would have been able to achieve given his emotional difficulties prior to his brain injury. It was undisputed that Hugh had graduated from St. Joseph's Preparatory School with a cumulative grade point average of 3.55 and had completed his first year of college at the University of Pennsylvania. Pa. Rec. 885-86. Hugh wanted to go to medical school after graduating from Penn and become a neurosurgeon, an intention that was documented on Hugh's SAT records. Pa. Rec. 637-38, 771. Plaintiffs' economist testified that Hugh's loss of future earning capacity (wages plus fringe benefits) ranged from $3,228,413 (college graduate) to $13,854,761 (neurosurgeon) depending upon his ultimate level of achievement. Pa. Rec. 727-36.

Of course, the jury also was to consider damages for intangibles such as pain and suffering, loss of life's pleasures, and disfigurement. As to these elements, there was significant testimony by

Hugh and by Plaintiffs' experts showing the horrific effect that the June 7 anoxic event had on Hugh's life. Pa. Rec. 546-91, 691-707.

### C. Temple's attempt to alter and conceal key evidence was discovered at trial.

After the malpractice occurred, Temple personnel altered and concealed crucial medical records that documented what happened to Hugh on June 7.

First, Nurse Lawson used white-out on Hugh's original flowsheet (documenting his vital signs) to obliterate and alter data that detailed the events of her discovery of Hugh and the resulting code. For example, Nurse Lawson acknowledged at trial that she substituted a heart rate of 38 for a time at which the original flowsheet reflected that Hugh's heart rate was zero. Pa. Rec. 205-12, 267-70. In her effort to re-portray the timing of what had occurred, she obliterated not one but seven separate entries in the flowsheet. *Id.* Even Temple's nursing expert testified that it was illegal to white-out records in the manner done by Nurse Lawson. Pa. Rec. 943-44.

Second, Nurse Lawson permitted the destruction of key data from Hugh's room monitor by failing to print out the data in a timely fashion. This room monitor contained a minute-by-minute account of Hugh's vital signs and would have provided the best evidence of what had occurred during the critical time period. Because Nurse Lawson neither printed this stored data nor documented it in Hugh's chart, the data was lost and the Gallaghers were

deprived of the means to conclusively disprove the version of events created with white out by Nurse Lawson. Pa. Rec. 234-25, 263.

Third, Temple's nursing supervisor removed Hugh's original flowsheet (now altered by white-out) from his medical chart and put the original in a sealed envelope in a drawer in the risk manager's office. Pa. Rec. 408. This was the only document from the foot-thick chart to be removed by Temple management. Pa. Rec. 402-03. The risk manager replaced the original record with a photocopy. Pa. Rec. 399-400. Because the white-out had been used in a careful manner, it was impossible to tell from the photocopy that the original had been altered. Pa. Rec. 1592.

Fourth, Temple provided the photocopy (not the original) to Plaintiffs' counsel during discovery. Temple then claimed on six separate occasions over the next three years that the original could not be found. Pa. Rec. 203, 234-35, 408-10. Temple's risk manager knew she had the original flowsheet throughout the litigation. Pa. Rec. 402-09.

Fifth, Temple personnel told the Gallaghers and the court that no alterations had been made in the medical records. When Nurse Lawson was deposed, she testified under oath that she had not altered any entries in the medical records. Without the benefit of the original flowsheet, the Gallaghers were in no position to challenge this testimony. Nurse Lawson would later acknowledge at trial that her deposition testimony was false. Pa. Rec. 205-12, 267-70.

Sixth, Temple attempted to conceal the existence of the original flowsheet not only from Plaintiffs' counsel but also from its own counsel. When asked about the whereabouts of the original flowsheet by defense counsel, Temple risk management falsely informed its own counsel that it could not find the flowsheet even though the risk manager knew she had the record all along. Pa. Rec. 447-48.

Seventh, when the risk manager removed the original flowsheet from the chart, she placed a post-it note in the original chart stating that the original flowsheet was in her office. Pa. Rec. 400. However, every time the chart was produced for deposition or photocopied for production to plaintiffs, the post-it note was removed from the original chart by Temple so that Plaintiffs would not see it and become aware that the original flowsheet existed and was located in the risk management office. Pa. Rec. 1594-95; 946-49. The post-it note was revealed at trial on a photocopy of the chart sent to a Temple expert witness. Pa. Rec. 946-49.

As a result of the foregoing conduct, it was not until the first day of trial that the Gallaghers became aware that white-out had been used by Nurse Lawson to alter the original record. It was not until the second day of trial that the Gallaghers became aware that the original flowsheet had been in the custody of Temple risk management all along.

Significantly, all of the testimony regarding these issues came into evidence without objection by

the defense and before Plaintiffs requested that the complaint be amended to allege punitive damages. The evidence was properly admitted because it was relevant to negligence and causation, as it explained why Plaintiffs were unable to show an exact time line surrounding the oxygen deprivation suffered by Hugh. Appendix ("App.) 9a, 20a. It was also relevant to spoliation and provided the foundation for the "adverse inference" charge that the trial judge would give the jury, advising them that the jury could assume for purposes of their deliberations that the altered entries and lost data would have contained information unfavorable to Temple. App. 34a.

Only after all of this evidence had been admitted, without objection, was a request for amendment to plead a punitive damage claim made and granted. Not a single piece of additional evidence was admitted as a result of the allowance of the punitive damages claim. Consistent with *Feld v. Merriam*, 485 A.2d 742 (Pa. 1984), the trial court bifurcated the case so that the jury would not hear evidence of Temple's net worth in the compensatory phase and would consider imposing punitive damages only if a predicate question were answered in the affirmative.

### D. The jury instructions and closing speeches.

At the close of the trial's first phase, the jury was given a verdict slip that contained four questions. Pa. Rec. 1382-83. Questions 1 and 2 required the jury to assess breach of duty, causation,

and the existence of compensatory damages. Question 3 asked the jury to state the amount of compensatory damages sustained "as a result of the negligence of Temple University Hospital." (*Id.*) Only after the jury had awarded compensatory damages was the jury to answer Question 4, the threshold question on punitive liability: "Was the conduct of Temple University Hospital willful or wanton or with reckless indifference to the rights of Hugh Gallagher, IV?" *Id.* The verdict slip did not ask the jury to punish Temple.

Significantly, the trial court did not give general instructions applicable to punitive liability and the jury was never advised that Question No. 4 was a predicate for assessment of punitive damages. Instead, the judge instructed them only regarding the elements of compensatory damages they were to consider. He stated that the jury was only to award compensatory damages sustained as a result of Temple's negligence. Pa. Rec. 1274-77, 1290-91, 1392-93. He specifically instructed the jury that they were not there to punish anyone. Pa. Rec. 1270, 1285.

During his closing speech, Plaintiffs' counsel presented an argument based upon the evidence and the reasonable inferences to be drawn from the evidence. Regarding the evidence showing Temple's effort to alter and conceal crucial medical records, it was essential that Plaintiffs' counsel address this evidence so that the jury would understand why Plaintiffs could not demonstrate the precise timing of Hugh's code and Temple's inadequate response. Plaintiffs' counsel argued as follows:

> How do we know that they did the wrong thing separate and apart from the records themselves? Their conduct. Their conduct. 450 years ago a fellow in England named Shakespeare wrote that the guilty flee when no one pursues. He wrote Oh, what a tangled web we weave when first we try to deceive. Is that what happened here? Yes, it is . . . . Now, what was the exact timing here? I should be able to tell you that because that's part of my burden, but I can't tell you the exact timing and I regret that. But that's not my fault. Because they destroyed the information.

Pa. Rec. 1173-75. This argument was proper because the cover-up evidence was relevant to negligence and causation and to the spoliation instruction that permitted the jury to make an adverse inference from Temple's actions. In any event, Temple did not object.

Temple now argues that Plaintiffs "repeatedly commingled the negligence and punitive damages issues" in the closing speeches. Certiorari Petition ("Cert. Pet.") 7. In fact, there was not any "commingling" because all of the evidence introduced before the jury was relevant to negligence and causation. Further, the jury never was instructed on punitive damages and instead was specifically instructed only to determine compensatory damages.

Temple now also complains that Plaintiffs' counsel used the phrase "cover-up" in his closing speech. Cert. Pet. 7. That phrase represented a fair characterization of Nurse Lawson's use of white-out to change multiple entries in the medical record, of the risk manager's conduct in removing the original record and replacing it with a photocopy that concealed the alteration, and of Temple's failure to disclose the original document during years of litigation until compelled to do so at trial. In any event, Temple's counsel did not object to the statement and therefore waived any complaint based upon it. Pa. Rec. 1175.

### E. The jury found negligence and awarded compensatory damages.

The jury returned a unanimous verdict that Temple had committed negligence in caring for Hugh and awarded $20 million in compensatory damages. This amount was $7 million less than the evidence of economic damages alone supported, not counting the pain and suffering and other intangible damages that the jury also considered.

The jury also answered "Yes" to Question No. 4 on whether Temple had committed willful, wanton or reckless conduct, the predicate to further consideration of punitive liability and damages. When the jurors were polled, all stated their agreement with the verdict and the verdict was recorded. Pa. Rec. 1314-17.

The trial court instructed the jury that they should return the following Monday to assess

punitive damages and was ready to excuse them when one of the jurors raised her hand and uttered the following: "I think the verdict that we came to, because we half on one and half on the other, the question –." Pa. Rec. 1317-18. When it became apparent that the juror may have been speaking about the jury's deliberations, the trial court interrupted the juror and instructed the jury to return on Monday. Pa. Rec. 1318-19.

As the Pennsylvania Superior Court later explained, the judge's action was proper because the verdict was unanimous, there had been no evidence of juror confusion, and Pennsylvania law does not permit a trial court to inquire into the jury's deliberative process under those circumstances. App. 24a. The Superior Court rejected Temple's "self-serving interpretation" about the juror's utterance and noted that the utterance "at best is ambiguous and could have just as easily have been interpreted to indicate that the jury had difficulty in reaching a consensus on liability or the amount of compensatory damages. In any event, the deliberative process is not to be inquired into in the absence of evidence of clear confusion." *Id.*

In its certiorari petition, Temple incorrectly says that a juror asked to speak with the judge privately following the verdict and the judge denied the request. Cert. Pet. 9. In fact, the juror in question asked to speak with the judge before the verdict, not afterwards. Pa. Rec. 1343. Temple has made this misstatement on multiple occasions, and repeatedly has been corrected.

## F. The jury awarded punitive damages in the second phase of trial.

The jury returned the following week to hear evidence as to Temple's net worth and to decide whether to award punitive damages and the amount of any such award. Before deliberating, the jury was instructed both by the trial court and by Plaintiffs' counsel that they were free to award zero dollars if they chose. Pa. Rec. 1366, 1373. Temple's counsel told the jurors in his speech that awarding punitive damages would not punish Temple, but would only punish the North Philadelphia community that Temple serves. Pa. Rec. 1371-72. After deliberations, the jury awarded $15,000 in punitive damages. Pa. Rec. 1375-76.

Temple's certiorari petition mischaracterizes the record by stating that "[t]he jury found petitioner liable for negligence, decided that punitive damages were warranted, and awarded $20 million in damages." Cert. Pet. 1. As made clear above, the actual course of events was somewhat different. The jury initially found that Temple negligently caused Hugh Gallagher's injuries and awarded $20 million in compensatory damages. Only thereafter did the jury reach Question No. 4, the predicate question to finding punitive liability and damages. In answering "yes" to that question, the jury did not directly address the issue of punitive damages let alone find that they were warranted. At no time was the jury asked to determine whether "punitive damages were warranted." Rather, the jury did not actually decide that punitive damages were warranted until it imposed them.

In a similar vein, the petition later states the jury initially decided whether Temple's conduct was "so reprehensible as to warrant punitive damages." Cert. Pet. 2. The jury never decided any such question during its initial deliberations, only Question No. 4 as stated. This subtle mischaracterization of the trial proceedings represents another effort to reinvent what actually happened.

## G. Further misrepresentations to this Court: the stricken affidavits.

Following the verdict, attorneys for Temple's excess insurance carrier conducted *ex parte* interrogations of at least two of the jurors. Temple received no permission from the trial judge to conduct these interrogations. Plaintiffs' counsel were not present or invited. The claimed product of these interrogations is two affidavits from the excess carrier's attorneys – not the jurors – who claim to have conducted the interrogations. The affidavits purported to paraphrase information supposedly given by these jurors in response to unknown questions. App. 26a. However, the affidavits were obtained in clear violation of Pennsylvania law and their content was inadmissible hearsay. In fact, the affidavits were so improper that when the trial court confronted Temple's counsel with the impropriety of Temple's conduct in obtaining them, he agreed that the affidavits should be struck from the record. He stated: "We don't need to get to the affidavits at all. If you want to remove the affidavits from the brief, it's okay with me . . . ." *Id.* The trial judge struck

the affidavits, and the Superior Court held that Temple could not base any argument on them. *Id.*

Improperly, Temple continues to present argument based upon these affidavits. Cert. Pet. 9. Since Temple continues to reference non-record material, it should be noted that Temple's assertion that one of the affidavits came from a juror is absolutely false. Both affidavits are from the excess carrier's attorneys. *Id.* Further, the characterization of the judge as "refusing" to consider the affidavits is belied by the fact that Temple's own counsel agreed that the affidavits should be struck from the record. *Id.* In view of Temple's other mischaracterizations in this certiorari petition, Temple's misrepresentations to the Court regarding the affidavits raise unfortunate concerns about candor to the Court and underscore the reasons that certiorari should be denied.

**H. The appellate process.**

After the trial court affirmed the verdict in all respects, the Superior Court, in an unpublished opinion, reversed the judgment for punitive damages under the Pennsylvania law that the right to punitive damages is "a mere incident to a cause of action" and that punitive damages could only be based on the subject matter of the action, not on a post-incident cover-up. App. 18a-19a. The Superior Court established Pennsylvania law by citing *Weider v. Hoffman*, 238 F. Supp. 437 (W.D. Pa. 1965), in which a federal district court described Pennsylvania law on the availability of punitive damages and quoted the Pennsylvania Supreme Court's decision

in *Hilbert v. Roth*, 149 A.2d 648, 652 (Pa. 1959). The Superior Court then cited the Pennsylvania statute providing for punitive damages in medical malpractice cases, 40 P.S. § 1303.505(a), and the common-law principles summarized in Restatement (Second) of Torts § 902 to further establish Pennsylvania's requirement that punitive damages must be based upon the underlying cause of action. App. 19a.

The Superior Court affirmed the compensatory award under Pennsylvania law as well. In particular, the Court rejected Temple's claim of prejudice on grounds that "all of the evidence concerning the alleged cover up, which Appellant now complains tainted the jury, was relevant to liability and was admitted without objection by Appellant before the Appellees orally requested an amendment of the complaint to include a claim for punitive damages." App. 20a. The Superior Court added that because the trial judge bifurcated the trial, no evidence of Temple's net worth or other evidence solely relevant to punitive damages was heard by the jury in the compensatory phase, and that the verdict, "while significant, was still seven million dollars less than the asserted economic damages submitted into evidence by the Appellees." App. 20a-21a.

Temple appealed to the Pennsylvania Supreme Court, which entered an Order remanding the case to the Superior Court "with instructions to review the record and reconsider whether Petitioner has demonstrated that it has suffered prejudice from the trial court's error." App. 11a. After receiving

additional briefs from the parties, the Superior Court, in another unpublished opinion, again affirmed the judgment on compensatory damages, explaining that there was no prejudice and no improper "intertwining" of compensatory and punitive damages given (1) the absence of any evidence solely relevant to punitive damages, (2) the jury instructions that focused solely on compensatory damages, (3) the absence of any reference to "punishment" or "punitive damages" in either closing speeches or the verdict slip, and (4) the verdict for an amount substantially less than would have been supported by the evidence. App. 6a-9a.

Temple again petitioned the Pennsylvania Supreme Court for allowance of appeal. The Pennsylvania Supreme Court denied Temple's petition on June 28, 2007, and this petition ensued.

## REASONS THE WRIT SHOULD BE DENIED

### I. This Court lacks jurisdiction under the principles enunciated in *Michigan v. Long*.

This Court long has held that it will not consider an issue of federal law on review from a judgment of a state court if the judgment rests on a state-law ground that is independent of the federal issue and provides an adequate basis for the court's decision. *See Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983). This jurisdictional principle is grounded in respect for the independence of state courts and the desire to avoid rendering advisory opinions. *See id.*; *Harris v. Reed*, 489 U.S. 255, 260 (1989). Here,

Temple claims that a constitutional error occurred when the trial court allowed the jury to hear evidence of Temple's post-malpractice conduct and allowed a punitive damages claim on the basis of that evidence. The Superior Court analyzed and decided that claim under state law principles that are wholly independent of federal constitutional law. App. 2a, 13a. Because those grounds are adequate and independent of federal law, certiorari should be denied.

The Superior Court's decision that the evidence was properly allowed was based entirely on state law: the evidence was relevant to negligence and causation and it came in without objection, causing the waiver of any subsequent objection Temple might have wished to interpose. App. 9a, 20a.

The Superior Court also disallowed the punitive damages claim on state law principles. Pennsylvania law provides that "no award for punitive damages may be made where actual damage has not been suffered." *Hilbert v. Roth*, 149 A.2d 648, 652 (Pa. 1959). Accordingly, "[t]he right to punitive damages is a mere incident to a cause of action – an element which the jury may consider in making its determination – and not the subject (matter) of the action in itself." *Id.* The Superior Court invoked those principles by citing *Weider*, in which a federal court, exercising diversity jurisdiction, discussed Pennsylvania's law on punitive damages and quoted the above passage from *Hilbert*. App. 19a. The Superior Court also relied on the Pennsylvania statute governing the

allowance of punitive damages claims in medical malpractice actions. *See* 40 P.S. § 1303.505(a). It additionally relied on the Restatement (Second) of Torts § 902, which summarized the common-law principle that damages must flow from the injury giving rise to the claim. The entire analysis flowed from state-law principles.

As the Superior Court did not apply federal law in reaching this decision, either explicitly or implicitly, there was no reason for the Court to specifically state that it based its decision on state law. No ambiguity about the basis for the Superior Court's decision can be inferred under these circumstances, and Temple's contrary suggestion is without merit. Cert. Pet. 12.

Temple proposes an alternate reality where the Superior Court's opinion "recognized that the punitive damages claim could not pass muster under *State Farm*" (referring to *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003))." Cert. Pet. 1, 12. This argument is wrong on its face. The best evidence of what the Superior Court "recognized" is the opinion itself, which neither mentioned *State Farm* nor discussed any of the concepts that have been explored in this Court's punitive damages jurisprudence. Further, the issues addressed in *State Farm* – the admissibility of a defendant's out-of-state conduct against non-parties when determining the amount of punitive damages, and the constitutionally-permitted amount of a punitive damages verdict relative to an underlying compensatory damages verdict – were not even present in this case. *State Farm*, 538 U.S. at 422-23.

The sole basis for Temple's assertion is that a passage of the Superior Court's opinion uses language that looks similar to language used in *State Farm*. Cert. Pet. 12. This is a frivolous effort to fabricate a constitutional basis for the Superior Court's decision. As noted above, the Superior Court was dealing with a defendant's post-malpractice attempt to conceal and alter the evidence of its malpractice. It was not dealing with a defendant's conduct against non-parties, and certainly not a grossly excessive punitive damages award relative to compensatory damages. *State Farm* was not the unstated basis for the Superior Court's decision.

Federal law was also absent from the Superior Court's decision that Temple suffered no prejudice from any purported error. The Superior Court noted that all of the evidence about which Temple complained was relevant to negligence and causation, and admitted *without Temple's objection* before Plaintiffs sought to add punitive damages; hence the evidence was properly admitted and Temple waived any contrary argument. App. 20a. In addition, because the trial court bifurcated the trial to assure that evidence of Temple's net worth would not be admitted, "the jury did not hear any evidence in the compensatory phase that they would not have otherwise heard had there been no punitive damages claim." *Id.* "Furthermore, the amount of the compensatory damages, while significant, was still seven million dollars less than the asserted economic damages submitted into evidence by the Appellees." *Id.* 20a-21a.

Federal law was likewise absent when the Court rejected Temple's "jury investigation" argument because Pennsylvania law provides that verdicts may not be investigated absent clear evidence of jury confusion, *see Drum v. Shaull Equipment and Supply Co.*, 787 A.2d 1050 (Pa. Super. 2001), and no such confusion existed in this case given the unanimous verdict and the fact that the jurors were individually polled. App. 25a. The Court then found that Temple had waived any argument based on affidavits secured from lawyers for Temple's excess carrier because Temple had consented to the striking of those affidavits, which were inadmissible in any event under the Pennsylvania Rules of Evidence. App. 26a.

In summary, there is not a whiff of federal law in the Superior Court's opinion affirming the compensatory damages verdict. This Court should decline jurisdiction under *Michigan v. Long*.

## II. No *State Farm* violation occurred when the punitive damages claim was allowed.

Temple's central premise is that the allowance of the punitive damages claim was "constitutionally invalid" under *State Farm*. Cert. Pet. 1, 12. Temple is wrong. *State Farm* deals with whether evidence of a defendant's conduct toward non-parties is admissible in determining the amount of punitive damages, and the constitutionally permitted relationship between the amount of punitive damages and the underlying compensatory verdict. *State Farm*, 538 U.S. at 423-25. It has nothing to do with whether a defendant can be subject to punitive

damages for its post-malpractice efforts to conceal the evidence of its malpractice.

*State Farm*'s factual and procedural history confirms this point. In *State Farm*, insureds brought an action in Utah against an automobile liability insurer for its refusal to settle a wrongful death suit. The plaintiffs asserted claims for bad faith refusal to settle, fraud, and intentional infliction of emotional distress. They sought both compensatory and punitive damages. Before trial, State Farm moved *in limine* to exclude evidence of alleged conduct that occurred in unrelated cases toward unrelated persons outside of Utah. The trial court denied the motion, reasoning that such evidence was admissible to determine whether State Farm's conduct was intentional and sufficiently egregious to warrant imposition of punitive damages. The trial court also ordered a bifurcated trial. The first phase only decided whether State Farm committed bad faith by unreasonably refusing to settle the case. The second phase determined the plaintiffs' claims for fraud and intentional infliction of emotional distress, their compensatory damages, and the issues of punitive liability and damages. *See id.* at 413-16.

It is worth repeating that last sentence to emphasize why *State Farm* does not prohibit what happened here. In *State Farm*, the second phase of trial determined plaintiffs' claims for fraud and intentional infliction of emotional distress, *their compensatory damages, and the issues of punitive liability and damages*. In other words, what happened in *State Farm* is exactly what Temple says is unconstitutional under *State Farm*. Had this

Court felt that that the Due Process clause mandated a complete bifurcation of compensatory damages issues from punitive liability issues, the Court would surely have said so. Instead, the Court said nothing on that topic and focused its attention on other matters. *State Farm* itself provides the best evidence against Temple's use of *State Farm* in this case.

In any event, during the second phase of the *State Farm* trial, plaintiffs admitted evidence pertaining to State Farm's practices over 20 years in numerous states against numerous persons. *See id.* Most of the practices bore no relation to the automobile insurance policy at issue in the case. As this Court would explain, the *State Farm* trial "was used as a platform to expose, and punish, the perceived deficiencies of State Farm's operations throughout the country." *Id.* at 420. After the second phase, the jury awarded $2.6 million in compensatory damages and $145 million in punitive damages. *See id.* at 415.

The issue raised by this massive punitive damages verdict relative to compensatory damages was the scope of procedural and substantive limitations on punitive damage awards imposed by the Due Process Clause and the Fourteenth Amendment. *See id.* at 416. Building principally on this Court's decision in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), this Court reversed the $145 million punitive damages award on grounds that it amounted to an arbitrary and unreasonable deprivation of property. The Court explained that a State cannot punish a defendant for out-of-state

conduct against non-parties and that only conduct with a "nexus to the specific harm suffered by the plaintiff" could form the basis for punitive damages. *Id.* at 422-23. "Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis." *Id.* Absent this limitation, defendants would be subject to multiple punitive damages awards for the same conduct. *See id.* In addition, while no bright-line can be imposed regarding the permitted ratio of punitive to compensatory damages, "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process." *Id.* at 425. Central to the Court's analysis was the notion that a person should receive "fair notice" of the conduct that will subject him to punitive damages and of the severity of the penalty that a State may impose. *Id.* at 417.

*State Farm* and its progeny, most recently this Court's decision in *Phillip Morris USA v. Williams*, 127 S. Ct. 1057 (U.S. 2007), provide a constitutional framework for determining the admissibility of evidence of a defendant's conduct toward non-parties and the permitted relationship between punitive and compensatory damages to avoid grossly excessive or arbitrary punitive damage awards. That framework has no relevance to this case, which does not involve Temple's conduct toward non-parties of any kind. The instant case does not even raise a *State Farm* issue, let alone involve a *State Farm* violation.

## III. No constitutional error, let alone a "structural error," occurred when the jury was permitted to hear evidence and argument regarding Temple's post-malpractice conduct.

Temple next argues that allowing the jury to hear evidence and argument regarding Temple's post-malpractice conduct (a purported *State Farm* error) amounted to a "structural error" mandating a new trial under this Court's decisions in *Chapman v. California*, 386 U.S. 18, 21-22 (1967), and *Arizona v. Fulminante*, 499 U.S. 279, 306-08 (1991). Cert. Pet. 12-13. This argument is wrong for multiple reasons.

By way of background, *Chapman* and *Fulminante* are seminal cases regarding the review of constitutional errors that occur during trial, primarily in criminal cases. In *Chapman*, this Court held that a constitutional error occurring in a criminal trial did not automatically require reversal of the verdict; instead, such error may be held harmless if the court concludes that the error "was harmless beyond a reasonable doubt." *Chapman*, 386 U.S. at 21-22, 24. In *Fulminante*, this Court characterized the constitutional errors subject to *Chapman* review as "trial errors" – errors that occur during the presentation of the case to the jury and that "may therefore be quantitatively assessed in the context of the other evidence presented in order to determine whether its admission was harmless." *Fulminante*, 499 U.S. 306-10. The Court distinguished "trial errors" from those constitutional mistakes that cause a "structural defect in the constitution of the trial mechanism." *Id.* at 310.

These structural errors are not subject to harmless error review; they are harmful *per se* and mandate reversal of the verdict. *See id.*

*Fulminante* did not define what amounts to a "structural error," but it provided several examples: the total deprivation of the right to counsel at trial, *see Gideon v. Wainwright*, 372 U.S. 335 (1963), a biased judge, *see Tumey v. Ohio*, 273 U.S. 510 (1927), the unlawful exclusion of members of a defendant's race from a grand jury, *see Vasquez v. Hillery*, 474 U.S. 254 (1986), and the right to a public trial, *see Waller v. Georgia*, 467 U.S. 39 (1984). *Fulminante* explained that "[w]ithout these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Fulminante*, 499 U.S. at 310.

Here, Temple suggests that a "structural error" occurred when the jury was permitted to consider whether Temple's post-malpractice actions amounted to willful, wanton or reckless conduct. "It is simply impossible," Temple argues, for a jury to decide issues of liability and compensatory damages and not be impacted by evidence relevant to punitive damages. Cert. Pet. 13. This statement requires several responses.

First, the suggestion that this case involved a constitutional disaster akin to the examples provided in *Fulminante* reflects a total lack of perspective on what is fundamental in our constitutional system. Due Process is not violated when admissible evidence is admitted without objection. Even if some

theoretical Due Process violation occurred, the error is a classic "trial error" and not equivalent in constitutional magnitude to a deprivation of the right to counsel, or being forced to try a case before a biased judge, or a deprivation of a public trial.

Second, in any event, no *State Farm* violation could conceivably have occurred during the compensatory trial because none of the indicia of a *State Farm* violation were even present. Evidence about Temple's post-malpractice conduct in the instant case was properly admitted without objection because it was relevant to Plaintiffs' ability to carry their burden or proof and to demonstrate spoliation. Further, (1) the jury was never instructed on punitive liability; (2) the jury was never asked on the verdict slip whether Temple was should be punished for its actions; (3) in fact, the jury was specifically instructed that its job was only to determine negligence and compensatory damages, that it was not to punish anyone, and that it was entitled to make an adverse inference from Temple's concealment and alteration of crucial evidence; (4) Plaintiffs' counsel was entitled to discuss all properly admitted evidence at closing argument; and (5) Question No. 4 was asked without reference to the question as a predicate for a later determination of punitive damages.

Third, bifurcation of trials is a well-established and flexible procedure that has never been viewed as raising federal constitutional questions in either state of federal courts. It should be noted that while Temple cites eight state statutes when discussing bifurcation, only the Mississippi

statute actually mandates the complete bifurcation of compensatory and punitive issues. Cert. Pet. 13. The Arkansas, Minnesota, North Carolina, New Jersey, and North Dakota statutes require bifurcation only if a party requests it. *Id.* Temple mischaracterizes the Virginia statute, which applies only in asbestos cases and does not even provide for bifurcation upon a party's request. *Id.* Moreover, Temple ignores seven other statutes that specifically provide for a procedure along the lines of what occurred in the instant case: punitive liability to be tried along with compensatory damages and for a separate proceeding only to determine the *amount* of punitive damages (so that net worth evidence will not be heard by the jury in the compensatory phase). *See* Tex. Civ. Prac. & Rem. § 41.009; Ala. Code § 6-11-23; Ga. Code Ann. § 51-12-5.1; Kan. Stat. Ann. § 60-2702; Mo. Ann. Stat. § 510.263; Mont. Code Ann. § 27-1-221; Nev. Rev. Stat. § 42.005. Many statutes addressing punitive damages do not provide for any bifurcation whatsoever. *See, e.g.*, Cal. Civ. § 3294; Col. Rev. Stat. § 13-21-102; Idaho Code § 6-1604; Iowa Code § 668A.1; Ind. Code. § 34-51-3-3; Ky. Rev. Stat. Ann. § 411.186; La. Civ. Code Ann., art. 3546; S.C. Code Ann. § 15-33-135. This diversity of approaches forecloses Temple's suggestion that the federal constitution permits only one way of handling punitive damages, as does the total absence of jurisprudence discussing these various approaches in a constitutional framework.

Fourth, the law review articles cited by Temple underscore the lack of constitutional dimension to the trial judge's decisions in this case. Cert. Pet. 14. These articles focus on the effect of

introducing net worth evidence or other evidence *solely* relevant to the determination of punitive damages when a jury must determine liability and compensatory damages. No such evidence was admitted here. Indeed, the article on which Temple primarily relies – Steven S. Gensler, PREJUDICE, CONFUSION, AND THE BIFURCATED CIVIL JURY TRIAL: LESSONS FROM TENNESSEE, 67 Tenn. L. Rev. 653 (2000) – examines results in a state whose laws specifically require that punitive liability be tried with compensatory damages. *See Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896 (Tenn. 1992). In any event, that article makes a policy argument, not a constitutional argument.

Fifth, the cases cited by Temple on pages 14 and 15 of its certiorari petition further demonstrate the lack of constitutional dimension to Temple's complaints. Not one of these cases even remotely suggests that bifurcation represents a constitutional mandate or anything other than a trial management issue. They also involve issues unrelated to this case. In *Burke v. Deere & Co.*, 6 F.3d 497 (8th Cir. 1993), the appellate court set aside a compensatory damages verdict because, *inter alia*, the jury had heard evidence of the defendant's net worth and that evidence tainted the compensatory verdict. In *Hartford Underwriters Ins. Co. v. Williams*, 936 So. 2d 888 (Miss. 2006), the appellate court ordered a new trial because the trial court had failed to comply with the Mississippi statute requiring bifurcation of punitive damages and hence the jury heard evidence about the defendant's net worth. These cases both involve the introduction of net worth damages in the compensatory phase – something that did not

happen here. In *Francis v. Coughlin*, 755 F. Supp. 618 (S.D.N.Y.), a district court ordered a new trial on damages because there was overwhelming evidence of juror confusion. There was no such evidence here and Temple's argument on that subject has been rejected multiple times under Pennsylvania law.

Sixth, the federal courts themselves view whether and how to bifurcate a civil trial as matters for trial court discretion. "Our approach to the issue as a matter of federal law has been to favor bifurcation of the amount of punitive damages as the preferred method, but to leave the mode of trial ultimately to the discretion of the district judge." *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277, 283 (2d Cir. 1990) (citation omitted). Federal courts exercise this discretion with the understanding that proper instructions will be heeded by the jury. *See Weidmer v. International Flavors & Fragrances*, No. C05-4138-MWB, 2007 WL 1959103 (N.D. Iowa. July 3, 2007) (citing *Francis v. Franklin*, 471 U.S. 307, 316 n.9 (1985); *Opper v. United States*, 348 U.S. 84, 95 (1954)); *see also Kociemba v. G.D. Searle & Co.*, 683 F. Supp. 1577 (D. Minn. 1988). It would be strange for the federal courts to view bifurcation as a matter for trial court discretion in federal cases, but as a matter of constitutional moment for state cases. Temple offers no support for any such suggestion.

Under all of these circumstances, there is no merit to Temple's notion that the ordering of evidence and argument in this case represented not just an error, but one of such magnitude that it equates in constitutional significance to the deprivation of the right to counsel and qualifies as a

"structural error" under *Fulminante*. This never-before raised argument has been constructed solely for the purpose of this certiorari petition. The argument is substantively wrong, has not been even been addressed in other cases, and does not warrant this Court's review.

## IV. Temple's argument regarding the "presumption" of harmlessness is not worthy of this Court's review.

Temple's final argument is that even if there were no "structural error" under *Fulminante*, the *State Farm* violation that occurred during trial was improperly handled by the Pennsylvania courts because those courts failed to place the burden on Plaintiffs of demonstrating that no prejudice occurred as a consequence of the error. Cert Pet. 16-17.

This argument does not warrant certiorari for several reasons. First, it is predicated on the notion that a *State Farm* violation occurred during the trial, a notion that fails for the reasons discussed above.

Second, Temple does not cite even a single instance in which *Chapman* or *Fulminante* have been applied or otherwise discussed in the context of a typical civil action. They cite several cases in which federal courts apply a version of the *Chapman* standard when undertaking habeas corpus review of state criminal convictions. Habeas review is technically a civil proceeding, but it is directed to determining whether a person should remain in custody and has nothing to do with civil liability for

tortious conduct. *See O'Neal v. McAninch*, 513 U.S. 432, 440 (1995) ("Unlike the civil cases cited by the States, the errors being considered here by a habeas court occurred in a criminal proceeding, and therefore, although habeas is a civil proceeding, someone's custody, rather than mere civil liability, is at stake."). It should also be noted that *O'Neal* addressed whether a judge should grant a habeas corpus petition when the judicial mind is in "virtual equipoise" as to the harmlessness of a trial error. In the instant case, the Superior Court has not struggled with its decision. It twice found a total absence of prejudice and did not even publish its opinions.

Temple cites one other case in which *Chapman* was cited. *See A.B. v. Y.Z.*, 878 A.2d 807 (N.J. 2005). There, a teacher was deprived of a Sixth Amendment Confrontation Clause right to confront her accuser in a tort suit brought by a student against the teacher for sexual abuse. The student had been permitted to testify via closed-circuit television, but it was determined that the Sixth Amendment required the student's presence in the courtroom. Although the burden to demonstrate harmlessness now lay on the student, the New Jersey Supreme Court still concluded that the error was harmless because defense counsel subjected the student to a complete cross-examination and because of the judicial discretion to control the presentation of evidence. *See id.* at 812. Needless to say, the instant case does not involve a Sixth Amendment violation or anything like it.

Third, as in *A.B. v. Y.Z.*, and in contrast to *O'Neal*, this case does not present close issues that might turn on which party has the "burden of proof." The Superior Court twice has found that there was no error in the admission of the evidence of Temple's post-malpractice conduct, no error in the argument based upon that evidence, and no resulting prejudice given that (1) Temple had waived any objections to purported error, (2) the jury was not instructed on punitive liability or damages in the compensatory phase, (3) the jury did not decide punitive liability or damages in the compensatory phase, (4) the jury was specifically instructed that they were not there to punish anyone, and (5) the compensatory verdict was for millions less than the evidence would have permitted. App. 2a, 11a. Under these circumstances, the outcome would be the same even if Plaintiffs had the burden of showing harmlessness.

## CONCLUSION

Temple proposes that this Court review the unpublished opinions of an intermediate state appellate court regarding a manufactured issue that is not the subject of conflicting judicial opinions because no cases have even discussed it. The petition does not present an issue worthy of this Court's review. The petition should be denied.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

TEMPLE UNIVERSITY HOSPITAL,

*Petitioner,*

v.

HUGH B. GALLAGHER, III AND JOANNE GALLAGHER, GUARDIANS OF THE ESTATE OF HUGH B. GALLAGHER, IV

*Respondents.*

**On Petition for Writ of Certiorari to the Superior Court of Pennsylvania**

## REPLY TO BRIEF IN OPPOSITION

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## INTRODUCTION

Respondents devote the bulk of their opposition brief to arguing a point that they lost below: whether the Federal Constitution bars awards of punitive damages based on a defendant's acts independent of the acts upon which compensatory liability was premised. This Court answered that question in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003): "A defendant's ... acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages." Petitioner relied on *State Farm* in challenging the punitive damages award in the Pennsylvania appellate court, and that court upheld that challenge, and reversed the punitive award, in language drawn virtually verbatim from *State Farm*: "We agree with [petitioner's] contention that a defendant's acts that are independent from the conduct on which liability is premised may not serve as the basis for punitive damages." Pet. App. 18a.

Accordingly, and contrary to respondents' suggestion, this petition does not present the question whether the punitive damages award in this case is constitutionally invalid under *State Farm*. That question was already decided in petitioner's favor below. Rather, the question presented here is the logically subsequent question of how to redress that federal constitutional error. The problem here is that the constitutionally invalid punitive damages claim tainted the $20 million compensatory damages award in respondents' favor, and that problem was not solved by reversal of the $15,000 punitive damages award in their favor. In analyzing the effect of the *State Farm* error on the compensatory damages award, the Pennsylvania appellate court started from the premise that the constitutional error was harmless, and forced petitioner—the party aggrieved by the error—to prove otherwise. As explained in the petition, that was error, and the decision below squarely conflicts with decisions from other federal and state appellate courts on this important and recurring issue of federal law.

Respondents try their best to downplay the burden of proof issue, relegating it to the last few pages of their opposition brief. According to respondents, there is no problem with presuming that federal constitutional errors in civil cases are harmless, and saddling parties aggrieved by such errors with the burden of proving otherwise. If ever there were a red flag that certiorari is warranted, this is it. This Court's constitutional jurisprudence would be quite hollow if the lower courts could dismiss federal constitutional errors (like the *State Farm* error at issue here) as presumptively harmless in civil cases. Indeed, that approach turns the law upside down: as many federal and state appellate courts have recognized, federal constitutional errors must be presumed harmful, not harmless, in civil as well as criminal cases. Respondents cannot—and do not—contest that point, or deny that this issue presents an important and recurring issue of federal constitutional law. Accordingly, this Court should grant certiorari, and either summarily reverse the judgment or set the case for plenary review.

## I. This Court Has Jurisdiction To Review The Federal Questions Decided Below.

As a threshold matter, respondents argue that "[t]his Court lacks jurisdiction under the principles enunciated in *Michigan v. Long*" because "there is not a whiff of federal law in the Superior Court's opinion." Opp. 18, 22. That argument is plainly incorrect.

The whole point of *Michigan v. Long*, 463 U.S. 1032 (1983), is to create a presumption that a state-court decision was based on federal law where there is uncertainty on that score. *See id.* at 1040-41. This is precisely the kind of case for which that presumption was created. The Pennsylvania appellate court acknowledged that petitioner challenged the punitive damages award in this case on the ground that "it is in derogation of *both* controlling federal constitutional law and Pennsylvania law." Pet. App. 16a (emphasis added); *see also id.*

("[Petitioner] argues that *both* federal due process and Pennsylvania law require that a claim for punitive damages must be based upon the conduct causing the specific injury for which liability is being asserted and not upon unrelated conduct occurring post-injury.") (emphasis added).

The Pennsylvania appellate court upheld that challenge without specifying whether it was relying on federal or state law: "We agree with [petitioner's] contention that a defendant's acts that are independent from the conduct on which liability is premised may not serve as the basis for punitive damages." Pet. App. 18a. That language, as noted above, is drawn almost verbatim from *State Farm*, upon which petitioner relied heavily in its briefs to the Pennsylvania appellate court—indeed, the federal constitutional argument based on *State Farm* was petitioner's lead argument below. *See* Br. for Appellant Temple Univ. Hosp. (12/22/04) at 17-18, 20; Reply Br. for Appellant Temple Univ. Hosp. (2/7/05), at 1-2.

Accordingly, it is at the very least reasonable to assume that the Pennsylvania appellate court accepted petitioner's federal *State Farm* argument. There is absolutely nothing in the opinion to suggest that the Pennsylvania appellate court rejected petitioner's federal constitutional argument and relied solely on state law grounds to overturn the award of punitive damages. Thus, the *Michigan v. Long* presumption applies: "when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." 463 U.S. at 1040-41.

Respondents insist that "the Superior Court did not apply federal law in reaching this decision, either explicitly or implicitly" because that court "neither mentioned *State Farm* nor discussed any of the concepts that have been explored in this Court's punitive damages

jurisprudence." Opp. 20. But *Michigan v. Long* holds that a state court need not clearly and expressly base its decision on federal law for this Court to deem that federal law was the basis for the decision. Quite the opposite: *Michigan v. Long* established the default rule that a state court must "clearly and expressly" say that its decision is "based on bona fide separate, adequate and independent grounds" of state law for this Court to deem that federal law was not the basis for the decision. 463 U.S. at 1040-41; *see also Harris v. Reed*, 489 U.S. 255, 261 (1989) ("Under *Long* ... this Court may reach the federal question on review unless the state court's opinion contains a 'plain statement' that its decision rests upon adequate and independent state grounds.") (internal quotation and brackets omitted). Because the Pennsylvania appellate court said nothing of the sort, and upheld respondents' federal and state law challenge to the punitive damages award by paraphrasing *State Farm*, the presumption is that the court accepted petitioner's federal constitutional argument.

It necessarily follows that the central premise of respondents' brief in opposition—that no *State Farm* error occurred here—is mistaken. Petitioner challenged the punitive damages award here on federal constitutional grounds under *State Farm*, and the Pennsylvania appellate court upheld that challenge. Respondents thus miss the point by arguing that this case "does not even raise a *State Farm* issue, let alone involve a *State Farm* violation." Opp. 25. Respondents did not cross-petition from the Pennsylvania appellate court's reversal of the punitive damages award, and hence that decision is now the settled law of the case. *See, e.g., Bates v. United States*, 522 U.S. 23, 31 n.7 (1997); *United Steelworkers of Am. v. Rawson*, 495 U.S. 362, 376 (1990); *Missouri v. Jenkins*, 495 U.S. 33, 41 n.8 (1990); Robert L. Stern *et al.*, *Supreme Court Practice* § 6.35, at 444-49 (8th ed. 2002). Indeed, that decision is the very predicate for the issue presented here: whether a court may presume that a

federal constitutional error in a civil case was harmless, and saddle the party aggrieved by the error with the burden of proving otherwise. Respondents may disagree with petitioner's answer to that question, but they cannot pretend that it is not presented here.

## II. The Pennsylvania Appellate Court Violated Due Process By Presuming That The Jury's Consideration Of An Invalid Punitive Damages Claim Was Harmless.

Turning at last to the merits in the last few pages of their brief, respondents suggest that it is perfectly appropriate for courts to deem federal constitutional errors harmless in "a typical civil action," Opp. 32, as opposed to a criminal case or a civil habeas action. According to respondents, petitioner "does not cite even a single instance" in which a court suggested otherwise. *Id.* But even a cursory review of the petition shows that respondents are mistaken.

As noted in the petition, "both federal and state appellate courts have recognized—in sharp contrast to the court below—that 'presuming prejudice, rather than harmlessness, is required by Supreme Court precedent' as a general matter, *in civil as well as criminal cases*, with respect to constitutional errors and other errors affecting substantial rights." Pet. 16-17 (quoting *Obrey v. Johnson*, 400 F.3d 691, 701 (9th Cir. 2005) (emphasis added), and citing *Sims v. Great Am. Life Ins. Co.*, 469 F.3d 870, 886 (10th Cir. 2006); *Jerden v. Amstutz*, 430 F.3d 1231, 1240 (9th Cir. 2005); *In re Vanessa M.*, 138 Cal. App. 4th 1121, 1132 (Cal. Ct. App. 2006); *A.B. v. Y.Z.*, 878 A.2d 807, 811-12 (N.J. 2005) (*per curiam*)). None of these cases are criminal cases or civil habeas cases, so respondents' suggestion otherwise is baseless. *Cf. United States v. Gonzalez-Flores*, 418 F.3d 1093, 1099 n.3 (9th Cir. 2005) (emphasizing that, in both criminal and civil cases, the party benefiting from a constitutional error must prove

that it is harmless, and the party aggrieved by the error need not prove that it is harmful).

Those cases are by no means outliers; to the contrary, every federal court of appeals to consider the issue has concluded that federal constitutional errors, or other errors that affect substantial rights, must be deemed harmful, not harmless, unless and until the party that benefited from the error proves otherwise. "Justice Rutledge first expressed th[e] test [for harmless-error review] in *Kotteakos* [*v. United States*, 328 U.S. 750, 765 (1946)], a criminal case, and since then, the majority of our sister circuits have applied it in the civil context." *Taylor v. Virginia Union Univ.*, 193 F.3d 219, 235 (4th Cir. 1999) (*en banc*), *abrogated in part on other grounds by Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003) (citing *Williams v. United States Elevator Corp.*, 920 F.2d 1019, 1022-23 (D.C. Cir. 1990); *Schrand v. Federal Pac. Elec. Co.*, 851 F.2d 152, 157 (6th Cir. 1988); *Aetna Cas. & Sur. Co. v. Gosdin*, 803 F.2d 1153, 1159 (11th Cir. 1986); *Lataille v. Ponte*, 754 F.2d 33, 37 (1st Cir. 1985); *Howard v. Gonzales*, 658 F.2d 352, 357 (5th Cir. Unit A 1981); *Cohen v. Franchard Corp.*, 478 F.2d 115, 125 (2d Cir. 1973)); *see also Jordan v. Medley*, 711 F.2d 211, 218-19 & n.6 (D.C. Cir. 1983) (Scalia, J.) (noting that the *Kotteakos* standard applies in civil as well as criminal cases).[1]

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[1] The Fourth Circuit in *Taylor* "recognize[d] that three circuits have refused to apply the *Kotteakos* standard in the civil context primarily on the basis that proving harmless error in the criminal context as opposed to the civil context should be more difficult given the differing burdens of proof." 193 F.3d at 235 n.10 (citing *United States Indus., Inc. v. Touche Ross & Co.*, 854 F.2d 1223, 1252-53 (10th Cir. 1988); *McIlroy v. Dittmer*, 732 F.2d 98, 105 (8th Cir. 1984); *Haddad v. Lockheed Cal. Corp.*, 720 F.2d 1454, 1459 (9th Cir. 1983)). These three cases, however, stand only for the proposition that the standard for proving harmlessness should be whether the error "more likely than not" affected the verdict, as opposed to the semantically

Under the *Kotteakos* standard, the party benefiting from the error must prove that it was harmless. *See, e.g.*, *United States v. Baugham*, 449 F.3d 167, 177 (D.C. Cir. 2006) ("It is firmly established that the government bears the burden of showing the absence of prejudice in harmless error cases ... under *Kotteakos*."). By starting from the presumption that the federal constitutional error here was harmless, and saddling the party aggrieved by the error with the burden of proving otherwise, *see* Pet. App. 5a, 9a, the decision below squarely conflicts with these cases.

Respondents cannot—and do not—make a serious attempt to distinguish such contrary authority, which is not surprising. It is, to say the least, not obvious why federal constitutional errors must be presumed harmful in criminal cases, but may be presumed harmless in civil cases, and respondents suggest no basis for any such distinction. *See, e.g.*, *Taylor*, 193 F.3d at 235 ("[W]e can fathom no sound justification for using a different test for determining whether a lower court's error affected an appellant's substantial rights in the civil context as

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different *Kotteakos* standard. *See United States Indus.*, 854 F.2d at 1252-53 & n.39; *McIlroy*, 732 F.2d at 105; *Haddad*, 720 F.2d at 1459. These cases do not stand for the proposition that, in civil cases, the party aggrieved by a federal constitutional error may be saddled with the burden of proving that the error was harmful. Indeed, the Ninth Circuit recently relied on *Haddad* in holding that "presuming prejudice, rather than harmlessness is required by Supreme Court precedent" in civil as well as criminal cases, and expressly equated the *Haddad* standard with the *Kotteakos* standard. *Obrey*, 400 F.3d at 699-701. The bottom line on this score is that, regardless of semantic differences among the federal courts of appeals on the formulation of the harmless-error standard, none of those courts requires the party aggrieved by a constitutional error to prove prejudice in either the civil or the criminal context.

compared to the criminal context."). Certainly *Chapman v. California*, 386 U.S. 18 (1967)—the seminal case on the application of harmless-error analysis to federal constitutional errors—does not suggest any such distinction. Although *Chapman* happened to be a criminal case, it did not remotely limit its analysis to the criminal context. To the contrary, *Chapman* considered the question whether a federal constitutional error could *ever* be harmless, and held as a matter of federal constitutional law that it could—provided that "the beneficiary of [the] constitutional error" could so establish. 386 U.S. at 24.

Respondents try to sidestep this point by insisting that the burden is irrelevant here because the Pennsylvania appellate court "twice *found* a total absence of prejudice." Opp. 33 (emphasis added). But the Pennsylvania appellate court made no such "finding." Rather, the Pennsylvania appellate court merely held that "[petitioner] has failed to demonstrate that it suffered any prejudice" from the constitutionally invalid punitive damages claim. Pet. App. 5a; *see also* Pet. App. 9a ("[Petitioner] has failed to show prejudice."). The Pennsylvania appellate court, in other words, clearly based its decision on its conclusion that *petitioner* failed to carry its alleged burden of proof. Respondents thus miss the point by arguing now that the federal constitutional error was harmless, and that "the outcome would be the same even if [respondents] had the burden of showing harmlessness." Opp. 34.[2] Such self-serving speculation

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[2] Respondents repeatedly insist that the error must have been harmless because the verdict form did not use the words "punitive damages." *See, e.g.*, Opp. 14-15, 34. Indeed, apparently based on this semantic point, respondents go so far as to assert that "the jury did not decide punitive liability ... in the compensatory phase." Opp. 34. That assertion is plainly incorrect: the verdict form specifically asked the jury to decide whether petitioner's conduct was "willful or wanton or with

gets respondents nowhere, because that call is for a court—not respondents themselves—to make. By definition, no court could have decided that respondents carried their burden of proving that the federal constitutional error here was harmless, because no court ever put respondents to the test.

Respondents also miss the point by arguing over whether the federal constitutional error here was "structural" (requiring automatic reversal), or a mere "trial error" (requiring respondents to prove harmlessness). *See* Opp. 26-32. In no event is the right answer that petitioner, the party aggrieved by the federal constitutional error, bears the burden of showing that the error was harmful. Thus, even if respondents were correct that the error here was not "structural"—and they are not, for the reasons set forth in the petition, *see* Pet. 12-14 & n.6—the fact remains that the Pennsylvania appellate court still erred by relieving them of their burden of proving that the federal constitutional error was harmless.

The bottom line here is that this case provides this Court with an opportunity to clarify an important and recurring point of federal constitutional law that should have been settled at least since *Chapman*: that federal constitutional errors are presumptively harmful, not

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reckless indifference to the rights of [Gallagher]," Pa.Rec. 1383, the predicate for an award of punitive damages. By answering that question in the affirmative, the jury decided that respondents were entitled to punitive damages, so that the only question left was the amount of such damages (which was decided in a later proceeding). The jurors were not told that there would be a later proceeding, and nothing kept them from inflating the damages awarded in the first stage of the proceeding to account for their finding that petitioner's conduct was "willful or wanton or with reckless indifference to the rights of [Gallagher]." *Id.*

harmless. The fact that respondents seek to limit that point to the criminal context, fully 40 years after *Chapman*, only underscores the need for guidance. It certainly devalues federal constitutional rights, like the right recognized in *State Farm* not be to subjected to punitive damages based on conduct independent of the acts upon which liability is premised, to deem the denial of such rights presumptively harmless. Because respondents were not required to prove that the *State Farm* error in this case did not infect the $20 million judgment in their favor, that judgment is constitutionally invalid and cannot stand.

## CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari, and either summarily reverse the judgment or set the case for plenary review.

Respectfully submitted,

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